United States Circuit Court of Appeals

TENTH CIRCUIT.

No. 564

CHARLES A. SHEPARD, APPELLANT,

vs.

THE UNITED STATES OF AMERICA, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR DISTRICT OF KANSAS, FIRST DIVISION.

FILED FEBRUARY 8, 1932.

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Pleas and proceedings in the United States Circuit Court of Appeals for the Tenth Circuit, at the January Term, 1933, of said Court, before The Honorable Robert E. Lewis, The Honorable John H. Cotteral and The Honorable Orie L. Phillips, Circuit Judges.

Be It Remembered that heretofore, to-wit: on the 8th day of February, 1932, a transcript of record, pursuant to an appeal allowed by the District Court of the United States for the District of Kansas, was filed in the office of the clerk of the United States Circuit Court of Appeals for the Tenth Circuit, in a certain cause wherein Charles A. Shepard was appellant and The United States of America was appellee, which said transcript, as prepared and printed under the rules of the United States Circuit Court of Appeals for the Tenth Circuit under the supervision of its clerk, is in the words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF KANSAS.

Pleas and Proceedings before The Honorable Richard J. Hopkins, Judge of the United States District Court for the District of Kansas, presiding in the following-entitled cause:

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

CHARLES A. SHEPARD, DEFENDANT.

No. 5473.

Indictment.

United States of America, District of Kansas, First Division—ss.

In the District Court of the United States, within
2 and for the First Division of the District of Kansas, sitting at Topeka, Kansas, at the April term thereof, A. D. 1930.

The grand jurors of the United States, within and for the District and Division aforesaid, duly impaneled, sworn and charged, at the term aforesaid, by the court aforesaid, on their oaths find, charge, and present that on the 15th day of June, A. D., 1929, at and upon the United States Military Reservation at Fort Riley, Geary County, Kansas, upon land reserved and acquired for the exclusive use of the United States of America, and under the exclusive jurisdiction of the United States of America, in the First Division of the District of Kansas, and within the jurisdiction of this court, one Charles A. Shepard then and there being, did then and there knowingly, wilfully, unlawfully, purposely, feloniously, deliberately, premeditatedly, of his malice aforethought, and with intent so to do, kill and murder Zenana Shepard, a human being, said murder being perpetrated by giving and administering to her, the said Zenana Shepard, certain drugs

and poisons, to-wit: bichlorid of mercury, commonly known as corrosive sublimate, and other poisons to the grand jurors unknown, with the unlawful, felonious, and premeditated intent as aforesaid, to take the life of her, the said Zenana Shepard, and she, Zenana Shepard, from the effects of said poison did languish and languishing did then and there die on the 15th day of June, A. D. 1929; all this the said Charles A. Shepard did, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

L. E. WYMAN,
Assistant United States Attorney.

Witnesses.

Mrs. Chas. T. Skow, Ft. Riley, Kans.

3 Major E. J. Strickler, Ft. Riley, Kans.

Major J. C. Dye, Ft. Riley, Kans.

Capt. Martin DuFrenne, Medical Corp, Ft. Crook, Neb.

Major Hugh H. Mahon, Medical Corp, Ft. Omaha, Nebr.

Major Paul R. Hawley Nicaraguan Canal, Nicaragua.

Clara Brown, 1342 Fillmore, Topeka, Kans.

Col. Edward B. Vedder, c/o Army Medical School, Washington, D. C.

Major J. E. Ash, Medical Museum, Washington, D. C.

Theo. H. McCoskey, 1039 S. Corning St., Los Angeles, Calif.

Mrs. Theo. H. McCoskey, 1039 S. Corning St., Los Angeles, Calif.

Col. Walter R. Pick, 4412 Reservoir Road, Washington, D. C.

Sgt. J. C. Gresser, Ft. Riley, Kans.

Sgt. Windslow A. Rose, Ft. Riley, Kans.

F. H. Hauser, c/o Hauser Floral Co., San Antonio, Texas.

John C. Glass, Dept. of Justice, Kansas City, Mo.

R. J. Caffrey, Dept. of Justice, Kansas City, Mo.

C. R. Davis, Dept. of Justice Agent, San Antonio, Texas.

J. J. Lawrence, Special Agent, Dept. of Justice, San Antonio, Texas.

Mrs. Helen Austin, 144 So. 38 St., Omaha, Nebr.

E. C. Sawtell, Undertaker, Junction City, Kans.

B. W. Noel, Western Union, Junction City, Kans.

Mrs. Warner Gates, c/o Capt. Gates, Duncan Field, San Antonio, Texas.

Capt. John R. McDonald, Ft. Riley, Kans.

Mrs. Alice McDonald, Ft. Riley, Kans.

Martha Miller, 1043 North 34th St., Omaha, Nebr.

Mrs. Spencer Townsend, Ft. Leavenworth, Kans.

Delores Heilman, c/o Mrs. Chas. Skow, Ft. Riley, Kans.

Grace Brandon, San Antonio, Texas.

Curtis McCoskey, 1220 South Mosselin, Los Angeles, Calif.

Major Hedrick, Ft. Riley, Kans.

4 G. B. Willingham, Local Supt. Western Union, San Antonio, Texas.

J. V. Bell, Special Agt. Ry. Express Co., 302 West Market, San Antonio, Texas.

R. S. Scruggs, Manager Western Union, Waco, Texas.

J. W. Ross, Western Union, Topeka, Kans.

Mrs. C. M. Wylie, 2604 South Presa, San Antonio, Texas.

Gen. E. S. Symmonds, Ft. Riley, Kansas.

Major G. R. Callender, Army Medical Museum, Washington, D. C.

H. H. Hochwater, Post Office, San Antonio, Texas.

Dr. J. A. O'Donnell, Junction City, Kansas.

Major W. A. Rose, Army Dental School, Washington, D. C.

S. J. McAfee, 328 Post Office Bldg., Denver, Colo.

Jane Leader, 328 Post Office Bldg., Denver, Colo.

J. W. Scott, Jewelryman, Junction City, Kansas.

Mrs. Bryan Dawson, Clinton, Okla.

A. H. Hafner, Post Office, Junction City, Kansas.

W. A. Ship, Railway Express Office, Junction City, Kansas.

Major Gen. M. W. Ireland, War Dept., Washington, D. C.

Dr. Edmund A. Sayre, 652 Elmwood Ave., Providence, R. I.

Miss Geisler, 113 North 16th St., Omaha, Nebraska.

John Taylor, 108 South 11th St., Omaha, Nebraska.

Max Geisler, Jr., 113 North 16th St., Omaha, Nebraska.

Ralph D. Young, 511½ West Woodland, San Antonio, Texas.

H. L. Murray, Salesman Hertzbert Jewelry Co., San Antonio, Texas.

Miss E. E. Williams, 1431 Highland Blvd., San Antonio, Texas.

Miss Charlotta Schaefer, 116 Castilla Ave., San Antonio, Texas.

G. P. Benbow, c/o Stephen F. Austin Hotel, Austin, Texas.

W. M. Ewing, Jr., c/o Newsteter Company, Denver, Colo.

A. E. Powell, Credit Manager, Denver Dry Goods, Denver, Colo.

Major J. M. Wainright, Ft. Leavenworth, Kans.

H. J. Sticken, Dept. of Justice, Denver, Colo.

Private Jules Symmers, c/o Walter Reed Hospital, Washington, D. C.

C. W. Muehlberger, Northwestern University, Chicago, Illinois.

Pvt. Ruban Gaede, Ft. Riley, Kans.

5 Major Glenn, Denver, Colo.

Ralph Carr, U. S. Atty., Denver, Colo.

Frank Hall, Kansas City, Missouri.

Samuel G. Sturgess.

Endorsed: No. 5473. United States District Court, District of Kansas First Division. The United States of America v. Charles A. Shepard. Indictment Viol.: Sec. 273 Penal Code

and 275 Penal Code. Penalty: Death. A true bill, Warren J. Sheldon, Foreman.

Filed in open Court this 18th day of April, A. D. 1930, F. L. Campbell, Clerk. Bail $20,000.00.

Marshal's Return of Service on Copy of Indictment Served on Defendant.

The United States of America, District of Colorado—ss.

I hereby certify and return that I have duly served
6 the within writ upon the within named Charles A. Shepard, personally, at Fitzsimons General Hospital, in said District, on the 14th day of November, A. D. 1930.

R. C. CALLEN, U. S. Marshal.

Marshal's fees $2.00

Filed in the District Court on November 18, 1930.

Marshal's Return of Service on Defendant of Copy of Original Petit Jury Venire.

United States District Court, First Division, Disttrict of Kansas.

The President of The United States of America.

To the Marshal of the District of Kansas, Greeting:

You are hereby commanded to summon without delay
7 the following named persons whose names have been regularly drawn according to law, to-wit:

1. W. K. Waugh, Wabaunsee Co., Eskridge, Kans.
2. Mike Ryan, Osage Co., Osage City.
3. John Lytle, Wabaunsee Co., Belvue.
4. S. L. Shriner, Trego Co., Wakeeney.
5. G. E. Nemitz, Washington Co., Washington.
6. Geo. Shumacher, Jewell Co., Jewell.
7. J. A. Critchfield, Shawnee Co., Topeka.
8. W. E. Dyatt, Sherman Co., Kanorado.
9. J. E. Collins, Leavenworth Co., Leavenworth.
10. W. E. Cain, Jefferson Co., Perry.
11. Frank Summers, Shawnee Co., Topeka.

12. Adolph Achterberge, Lincoln Co., Lincoln.
13. J. E. James, Shawnee Co., Topeka.
14. C. H. Houseworth, Wabaunsee Co., Harveyville.
15. Reece Morgan, Riley Co., Bala.
16. Wm. Acker, Marshall Co., Vermilion.
17. Clair Morgan, Smith Co., Smith Center.
18. John Cleveland, Shawnee Co., Topeka.
19. L. S. Slocum, Nemaha Co., Seneca.
20. H. F. Tagge, Jackson Co., Holton.
21. George Reichart, Jefferson Co., Valley Falls.
22. Dan Casement, Riley Co., Manhattan.
23. F. E. Kimmons, Berryton, Shawnee Co.
24. M. L. Chrisman, Shawnee Co., Topeka, R. F. D. 5.
25. E. E. Palmer, Shawnee Co., Topeka, R. F. D. 4.
26. John T. Akin, Douglas Co., Lawrence.
27. Harry Knapp, Norton Co., Norton.
28. C. V. Miller, Wallace Co., Sharon Springs.
29. R. S. Campion, Leavenworth Co., Leavenworth.
30. John J. Roth, Ellis Co., Pfeiffer.
31. John Q. McDaniel, Sherman Co., Edson.
32. A. W. Adams, Wabaunsee Co., Maple Hill.
33. M. W. Converse, Wabaunsee Co., Eskridge.
34. Scott N. Dudley, Clay Co., Clay Center.
35. Don Welty, Shawnee Co., Topeka.
36. Joe Casey, Norton Co., Norton.
37. H. L. Guild, Nemaha Co., Bern.
38. I. L. Lutz, Jewell Co., Mankato.
39. F. E. Browning, Jewell Co., Webber.
40. Chas. E. Warren, Brown Co., Hiawatha.
41. A. T. Moore, Johnson Co., Olathe.
42. T. V. Harris, Leavenworth Co., Leavenworth.
43. Fred Beach, Pottawatomie Co., Havensville.
44. W. T. Lumb, Riley Co., Manhattan.
45. Harry D. Jones, Jackson Co., Mayetta.
46. W. A. Manaugh, Graham Co., Hill City.
47. H. H. Smith, Wabaunsee Co., Eskridge.
48. R. E. Wilson, Rooks Co., Plainville.
49. C. E. Koons, Wallace Co., Sharon Springs.
50. P. N. Grim, Pottawatomie Co., Onaga.
51. Gus Nott, Soldier, Kans.

If they be found in your District, to be and appear in the United States District Court for the First Division, District

of Kansas, at the City of Kansas City, in said District, on the 1st day of December, A. D. 1930, at 10 o'clock in the forenoon of said day, and so from day to day during the December 1930 Term of said Court, there to serve as Petit Jurors in said Court and not to depart the Court without leave thereof. And of your proceedings hereon make then and there due return, together with this writ.

Witness the Honorable Richard J. Hopkins, United
9 States District Judge at Topeka, in said District, this 1st day of November, A. D. 1930.

(Seal) F. L. CAMPBELL, Clerk.

United States of America, District of Kansas—ss.

I, F. L. Campbell, Clerk of the United States District Court in and for the District of Kansas, do hereby certify that the annexed and foregoing is a true and full copy of the original Venire for Petit Jurors issued for the December 1930 term of this court, now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court, at Topeka this 7th day of November, A. D. 1930.

(Seal) F. L. CAMPBELL, Clerk.
By ADALINE WHITE, Deputy Clerk.

United States of America, District of Colorado—ss.

I hereby certify and return that I have duly served a copy of the within Jury Venire upon Charles A. Shepard, personally, at Fitzsimons General Hospital, in said District, on the 14th day of November, A. D. 1930.

R. C. CALLEN, U. S. Marshal.

Marshal Fees and Costs $2.00.

Filed in the District Court on November 18, 1930.

Marshal's Return of Service on Defendant of Copy of Order Endorsing Additional Witnesses on Indictment.

Order Endorsing Additional Witness on Indictment.

For good cause shown, it is hereby directed that the
10 Clerk of this Court endorse the following additional names of material witnesses on the Indictment in the above entitled cause:

Curtis McCoskey, 1220 South Mosselin, Los Angeles, Calif.

Major Hedrick, Fort Riley, Kans.

G. B. Willingham, Local Supt. Western Union, San Antonio, Texas.

J. V. Bell, Special Agt. Ry. Express Co., 302 West Market, San Antonio, Texas.

R. S. Scruggs, Manager Western Union, Waco, Texas.

J. W. Ross, Western Union, Topeka, Kans.

Mrs. C. M. Wylie, 2604 South Presa, San Antonio, Texas.

Gen. E. S. Symmonds, Ft. Riley, Kans.

Major G. R. Callender, Army Medical Museum, Washington, D. C.

H. H. Hochwater, Post Office, San Antonio, Texas.

Dr. J. A. O'Donnell, Junction City, Kans.

Major W. A. Rose, Army Dental School, Washington, D. C.

S. J. McAfee, 328 Post Office Bldg., Denver, Colo.

Jane Leader, 328 Post Office Bldg., Denver, Colo.

J. W. Scott, Jewelryman, Junction City, Kans.

Mrs. Bryan Dawson, Clinton, Okla.

A. H. Hafner, Post Office, Junction City, Kans.

W. A. Ship, Railway Express Office, Junction City, Kans.

Major Gen. M. W. Ireland, War Dept., Washington, D. C.

Dr. Edmund A. Sayre, 652 Elmwood Ave., Providence, R. I.

Miss Geisler, 113 North 16th St., Omaha, Nebr.

John Taylor, 108 South 11th St., Omaha, Nebr.

Max Geisler, Jr., 113 North 16th St., Omaha, Nebr.

11 Ralph D. Young, 511½ West Woodland, San Antonio, Texas.

H. L. Murray, Salesman Hertzbert Jewelry Co., San Antonio, Texas.

Miss E. E. Williams, 1431 Highland Blvd., San Antonio, Texas.

Miss Charlotta Schaefer, 116 Castilla Ave., San Antonio, Texas.

G. P. Benbow, c/o Stephen F. Austin Hotel, Austin, Texas.

W. M. Ewing, Jr., c/o Newsteter Company, Denver, Colo.

A. E. Powell, Credit Manager, Denver Dry Goods, Denver, Colo.

RICHARD J. HOPKINS, Judge.

Endorsed: No. 5474. Order endorsing additional witnesses on Indictment. Filed Nov. 12, 1930. F. L. Campbell, Clerk.

United States of America, District of Kansas—ss.

I, F. L. Campbell, Clerk of the United States District Court in and for the District of Kansas, do hereby certify that the annexed and foregoing is a true and full copy of the original Order endorsing additional witnesses on Indictment filed November 12, 1930, in the case of United States vs. Charles A. Shepard, No. 5473, now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Topeka, this 17th day of November, A. D. 1930.

(Seal) F. L. CAMPBELL, Clerk.
By ADALINE WHITE, Deputy Clerk.

Marshal's Return.

United States of America, District of Colorado—ss.

I hereby certify and return that I have duly served the within order endorsing additional witnesses on Indictment in the within case, upon the therein named Charles A. Shepard, defendant in said action, by handing to and leaving a true

and correct copy thereof with him, personally, at Fitz-
12 simons General Hospital, in Adams County, in said District, on the 20th day of November, A. D. 1930.

R. C. CALLEN, U. S. Marshal.

Marshal's Fees: Service $2.00.

Filed in the District Court on November 24, 1930.

Marshal's Return of Service on Defendant of Copy of Additional Jury Venire.

United States District Court, First Division, District of Kansas.

The President of The United States of America.

To the Marshal of the District of Kansas, Greeting:

You are hereby commanded to summon without delay
13 the following named persons whose names have been regularly drawn according to law, to-wit:

1. J. C. Dolman, Shawnee County, R. F. D. 5, Topeka.
2. Wm. L. Newman, Douglas County, Lawrence.
3. Frank Winner, Shawnee County, R. R. 4, Topeka.
4. Joe Knier, Jefferson County, Valley Falls.
5. C. H. Hyer, Johnson County, Olathe.
6. W. A. Payne, Jefferson County, Oskaloosa.
7. Jess Lowe, Jefferson County, Perry.
8. I. C. Stevenson, Douglas County, Lawrence.
9. R. E. Richter, Jefferson County, Osawkie.
10. Lee Colman, Douglas County, Lawrence.
11. Charles Beeks, Douglas County, Baldwin.
12. C. S. Patrick, Jefferson Co., Oskaloosa.
13. R. R. McFarland, Douglas County, Lawrence.
14. Everett Stith, Douglas County, Lawrence.
15. G. W. Raines, Jefferson County, Oskaloosa.

If they be found in your District, to be and appear in the United States District Court for the First Division, District of Kansas, at the City of Kansas City, in said District, on the 1st day of December, A. D. 1930, at 10 o'clock in the forenoon of said day, and so from day to day during the December 1930 Term of said Court, there to serve as Petit Jurors in said Court and not to depart the Court

without leave thereof. And of your proceedings hereon make then and there due return, together with this writ.

Witness the Honorable, Richard J. Hopkins, United
14 States District Judge, at Topeka, in said District, this 15th day of November, A. D. 1930.

(Seal) F. L. CAMPBELL, Clerk.

United States of America, District of Kansas—ss.

I, F. L. Campbell, Clerk of the United States District Court in and for the District of Kansas, do hereby certify that the annexed and foregoing is a true and full copy of the original Additional Venire for Petit Jurors drawn November 15th, 1930, for the December 1930 Term of this court, now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Topeka, this 17th day of November, A. D. 1930.

(Seal) F. L. CAMPBELL, Clerk.
By ADALINE WHITE, Deputy Clerk.

Marshal's Return.

United States of America, District of Colorado—ss.

I hereby certify and return that I have duly served the within additional Venire for petit jurors drawn Nov. 15, 1930, for the December 1930 Term convening at Kansas City, December 1st, 1930, upon the defendant in the case of the U. S. v. Shepard, namely Charles A. Shepard, by handing to and leaving a true and correct copy thereof with him, personally, at Fitzsimons General Hospital, Adams County, in said District, on the 20th day of November, A. D. 1930.

R. C. CALLEN, U. S. Marshal.

Marshal's Fees: Service $2.00.

Filed in the District Court on November 24, 1930.

Marshal's Return of Service on Defendant of Copy of Order Endorsing Additional Witnesses on Indictment.

Order.

Now on this 24th day of November, A. D. 1930, on
15 application of the United States Attorney, it is hereby ordered that the following named witnesses be endorsed on the Indictment in said case:

Major J. M. Wainright, Ft. Leavenworth, Kansas.

H. J. Sticken, Dept. of Justice, Denver, Colo.

Private Jules Symmers, c/o Walter Reed Hospital, Washington, D. C.

C. W. Muehlberger, Northwestern University, Chicago, Illinois.

Pvt. Ruban Galde, Ft. Riley, Kansas.

Major Glenn, Langley Field, Va.

Ralph Carr, U. S. Attorney, Denver.

RICHARD J. HOPKINS, Judge.

Endorsed: No. 5473. Order. Filed Nov. 24, 1930, F. L. Campbell, Clerk.

United States of America, District of Kansas—ss.

I, F. L. Campbell, Clerk of the United States District Court in and for the District of Kansas, do hereby certify that the annexed and foregoing is a true and full copy of the original order, dated November 24, 1930, endorsing additional witnesses on the Indictment in the case of United States v. Charles A. Shepard, No. 5473, Criminal, now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed
16 my name and affixed the seal of the aforesaid Court at Topeka this 25th day of November, A. D. 1930.

(Seal)

F. L. CAMPBELL, Clerk.
By ADALINE WHITE, Deputy Clerk.

Marshal's Return.

United States of America, District of Colorado—ss.

I hereby certify and return that I have duly served the within certified copy of order endorsing additional witnesses on the Indictment in the case of the U. S. v. Shepard, upon Charles A. Shepard, defendant in this action, by handing to and leaving a true and correct copy thereof with him, personally, at Fitzsimons, in said District, on the 26th day of November, A. D. 1930.

R. C. CALLEN, U. S. Marshal,
By W. C. BLINN, Deputy.

Marshal's Fees: Service, $2.00; Expense, $1.50.

Filed in the District Court on November 29, 1930.

Journal Entry of Trial Before Judge Richard J. Hopkins, December 4, 1930.

17 Now on this 4th day of December, 1930, come the parties hereto, the United States appearing by S. M. Brewster, United States Attorney and L. E. Wyman, Assistant United States Attorney, and the defendant Charles A. Shepard appearing in person and by C. L. Kagey, Harry S. Class, L. M. Kagey and Keefe O'Keefe, his attorneys; thereupon the defendant waives arraignment on the Indictment herein and enters his plea of not guilty thereto. Thereupon the Court directs that a jury be impaneled; and the hour of adjournment having arrived and the impaneling of the jury not being completed the jurors selected are admonished of their duties by the Court and the further hearing of said case is postponed until tomorrow.

Order for Additional Petit Jury Venire Made by Judge Richard J. Hopkins, on December 4, 1930.

18 By consent of all counsel, it is by the Court ordered that the Clerk draw the names of twenty-five additional persons, residents of the First Division of the District of Kansas to serve as petit jurors at this term; not to delay trial.

Marshal's Return of Service on Defendant of Copy of Additional Jury Venire.

United States District Court, First Division, District of Kansas—ss.

The President of The United States of America.

To the Marshal of the District of Kansas, Greeting:

You are hereby commanded to summon without delay
19 the following named persons whose names have been regularly drawn according to law, to-wit:

1. Ernest Butell, Douglas County, Baldwin, Kans.
2. John W. Hall, Leavenworth Co., Leavenworth, Kans., 210 Columbia Ave.
3. Willie Casker, Leavenworth Co., Leavenworth, Kans., 3rd & Linn Sts.
4. Nathan Holman, Leavenworth Co., Leavenworth, Kans. 304 Maple St.
5. J. W. Edmiston, Atchison., Atchison Co., 414 No. 4th St.
6. C. E. Abbott, Shawnee Co., Topeka, 1262 Harrison St.
7. L. C. Baker, Douglas Co., Baldwin, Kans.
8. Claude B. Fiske, Atchison Co., Atchison, Kans. 623 Laramie St.
9. D. R. McWilliams, Douglas Co., Lawrence, Kans.
10. H. C. Bigelow, Johnson Co., Gardner, Kans.
11. Phillip Hawkins, Johnson Co., Olathe, Kans.
12. John G. Stutz, Douglas Co., Lawrence, Kans.
13. Matt Malone, Leavenworth Co., Leavenworth, Kans.
14. E. C. Cory, Douglas Co., Eudora, Kans.
15. T. E. Bird, Douglas Co., Eudora, Kans.
16. S. C. Andrews, Johnson Co., Olathe, Kans.
17. John F. Larrick, Johnson Co., Edgerton, Kans.
18. E. C. Schaake, Douglas Co., Lawrence, Kans.
19. George Boucher, Leavenworth Co., Leavenworth, Kans., 1308 So. Fifth St.
20. E. D. Burroughs, Jefferson Co., Grantville, Kans.

If they be found in your district, to be and appear
20 in the United States District Court for the First Division, District of Kansas, in the City of Kansas City, in said District, forthwith, and from day to day during the December 1930 Term of said Court, there to serve as petit jurors in said Court and not to depart the Court without

leave thereof, and of your proceedings hereon make then and there due return, together with this writ.

Witness the Honorable Richard J. Hopkins, United States District Judge, at Kansas City, in said District, this 1st day of December, 1930.

(Seal) F. L. CAMPBELL, Clerk.

United States of America, District of Kansas—ss:

I, F. L. Campbell, Clerk of the United States District Court in and for the District of Kansas, do hereby certify that the annexed and foregoing is a true and full copy of the original Venire for additional Petit Jurors for the December 1930 Term issued December 1, 1930, now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Kansas City, this 1st day of December, A. D. 1930.

(Seal) F. L. CAMPBELL, Clerk,
By ADALINE WHITE, Deputy Clerk.

To the Marshal for the Western District of Missouri to execute.

Marshal's Return.

Western District of Missouri, Western Division.

I hereby certify that I served a true copy of the within venire for additional Petit Jurors for the December 1930 Term upon defendant Chas. A. Shepard in the case of United States v. Charles A. Shepard, said Charles A. Shepard stating to me that he was the defendant in said cause, and taking a receipt from him which he signed "C A. Shepard" which said receipt is hereto attached and made a part of this return. All done in the lobby of the Baltimore Hotel in Kansas City, Missouri, at 3:50 p. m. on this, the 3rd day of December, 1930.

ASA W. BUTLER, United States Marshal.
By W. S. PETERS, Deputy.
Kansas City, Misouri, December 2, 1930.

Receipt is hereby acknowledged of a certified copy
21 of additional venire for petit jurors issued December 1, 1930, for the December 1930 Term of the District Court of the United States, for the District of Kansas.

C. A. SHEPARD.

Witness to signature: W. S. Peters, Deputy U. S. Marshal.

Filed in the District Court on December 5, 1930.

Journal Entry of Trial Before Judge Richard J. Hopkins, December 5, 1930.

Now on this 5th day of December, 1930, come the
22 parties hereto same as on yesterday, the defendant being present in person and the jurors heretofore selected being present, the impaneling of the jury is proceeded with, and the impaneling of the jury not being completed, and the hour of adjournment having arrived, the jurors selected are admonished of their duties by the court and the further hearing of said case is postponed until tomorrow.

Order for Additional Petit Jury Venire Made by Judge Richard J. Hopkins, on December 5, 1930.

By consent of all counsel, it is by the Court ordered
23 that the Clerk draw the names of fifteen additional persons, residents of the First Division of the District of Kansas, to serve as petit jurors at this term; not to delay trial.

Additional Jury Venire Issued December 4, 1930.

The President of The United States of America.

To the Marshal of the District of Kansas, Greeting:

You are hereby commanded to summon without delay
24 the following named persons whose names have been regularly drawn according to law, to-wit:

1. Harry Koch, Dickinson Co., Hope.
2. C. V. Morris, Norton Co., Almena.
3. Fred Swisher, Osage Co., Lyndon.
4. T. N. Rees, Marion Co., Marion.

5. LeRoy Scott, Republic Co., Norway.
6. Abe Goldmon, Leavenworth Co., Leavenworth.
7. Fred Nace, Geary Co., Dwight.
8. C. L. Wight, Saline, Salina, 432 So. 8th St.
9. John Ackley, Jefferson Co., Nortonville.
10. C. H. Mills, Jackson Co., Holton.
11. J. V. Wallace, Lyon Co., Emporia, 1101 Mechanic.
12. J. H. Abel, Jewell Co., Burr Oak.
13. L. F. Collins, Republic Co., Belleville.
14. H. J. Lohman, Leavenworth Co., Leavenworth.
15. Robert Cahill, Osage Co., Osage.
16. J. B. Carrico, Atchison, 1026 Santa Fe St.
17. T. E. Easter, Abilene, Dickinson Co.
18. C. M. Clark, Republic Co., Munden.
19. Paul E. Derge, Smith Co., Lebanon.
20. R. J. Stanton, Washington Co., Morrowville.
21. W. C. Gilmore, Nemaha Co., Oneida.
22. Edward Mallinger, Jackson Co., Holton.
23. W. L. Johnson, Dickinson Co., Woodbine.
24. C. L. Dockhorn, Jefferson Co., Oskaloosa.
25. Ed Benedich, Lyon Co., Emporia, R. R. 7.

If they be found in your district, to be and appear in the United

A. W. Dodge, 725 So. Santa Fe, Salina, Kansas.
25 Franklin A. Adams, Salina, Kansas.
Frank C. Bachtold, 711 Highland, Salina, Kansas.
W. P. Crumpacker, 1021 Division St., Atchison, Kansas.
J. D. Adams, Richmond, Kansas.
E. M. Becker, Durham, Kansas.
Oscar W. Steck, 313 So. 5th, Salina, Kansas.
J. W. Harris, 1221 Spruce, Leavenworth, Kansas.
John McConnell, Russell, Kansas.
Chas. L. Schwartz, 630 E. Iron, Salina, Kansas.

States District Court for the First Division, District of Kansas, in the City of Kansas City, in said District,
26 forthwith, and from day to day during the December 1930 term of said Court, there to serve as petit jurors in said Court and not to depart the Court without leave thereof, and of your proceedings hereon make then and there due return, together with this writ.

Witness the Honorable Richard J. Hopkins, United States District Judge, at Kansas City, in said District, this 4th day of December, 1930.

(Seal) F. L. CAMPBELL, Clerk.

United States Marshal's Return, District of Kansas.

Received this writ Dec. 4, 1930, at Kansas City, Kansas, and executed same by telephoning each of the within named persons Dec. 4, 1930.

DONALD H. MACIVOR,
United States Marshal.
By ETHEL HASSETT, Deputy.

Fees and cost, $11.67.

Filed in the District Court December 5, 1930.

Journal Entry of Trial Before Judge Richard J. Hopkins, December 6, 1930.

Now on this 6th day of December, 1930, come the
27 parties hereto, same as on yesterday, the defendant being present in person, the jurors heretofore selected being present the impaneling of the jury is proceeded with and completed, and thereupon the jury, to-wit: Ted Bates, J. W. Harris, M. L. Chrisman, F. E. Kimmons, W. A. Payne, T. E. Bird, Matt Malone, C. H. Mills, C. S. Patrick, E. Shultz, E. C. Schaake and Lee Colman, twelve good and lawful men of the body of the First Division of the District of Kansas, being duly impaneled and sworn to well and truly try the issues submitted to it and a true verdict give according to the law and the evidence, the trial of said case is proceeded with and the hour of adjournment having arrived and the trial of said case not being concluded the jury is admonished of its duties by the court and the further hearing of said case is postponed until Monday, December 8, 1930.

Additional Jury Venire Issued December 5, 1930.

The President of The United States of America.

To the Marshal of the District of Kansas, Greeting:

You are hereby commanded to summon without delay
28 the following named persons whose names have been regularly drawn according to law, to-wit:

1. W. E. Huddleston, Oskaloosa.
2. A. L, Jaenicke, Topeka, 300 Clay St.
3. R. A. Gilliland, Denison.
4. Jacob Fenn, Valley Falls.
5. E. W. Young, Lawrence.
6. T. E. Porter, Topeka, 112 E. Fifth.
7. J. A. Reinhard, Atchison.
8. E. Schultz, Lawrence, Route 3.
9. A. N. Armstrong, Atchison, 521 N. 10th St.
10. Charles Keane, Leavenworth.
11. F. H. Moore, Lecompton.
12. Al T. Johnston, Lawrence.
13. Ted Bates, Osawkie.
14. Harold C. Constant, Lawrence.
15. E. E. Ferguson, Valley Falls.
16. Charles Edmondson, Leavenworth, 5th and Ottawa.

If they be found in your district, to be and appear in the United States District Court for the First Division, District of Kansas, in the City of Kansas City, in said District, forthwith, and from day to day during the December 1930 term of said Court, there to serve as petit jurors in said Court and not to depart the Court without leave thereof, and of your proceedings hereon make then and there due return, together with this writ.

Witness the Honorable Richard J. Hopkins, United
29 States District Judge, at Kansas City, in said District, this 5th day of December, 1930.

(Seal) F. L. CAMPBELL, Clerk.

United States Marshal's Return, District of Kansas.

Received this writ Dec. 5, 1930, at Kansas City, Kansas,

and executed same by telephoning each of the within named persons Dec. 5, 1930.

DONALD H. MACIVOR, U. S. Marshal.
By ETHEL HASSETT, Deputy.

Fees and Cost $5.33.

Filed in the District Court December 6, 1930.

Journal Entry of Trial Before Judge Richard J. Hopkins, December 8, 1930.

30 Now on this 8th day of December, 1930, come the parties hereto same as on Saturday, December 6th, 1930, the defendant being present in person, and the jury being called and all being present the trial of said case is proceeded with; thereupon upon application of the United States Attorney he is given leave to endorse the name of Samuel G. Sturgess on the Indictment herein as an additional witness. Thereupon the hour of adjournment having arrived and the trial of said case not being concluded, the jury is admonished of its duties by the court and the further hearing of said case is postponed until tomorrow.

Journal Entry of Trial Before Judge Richard J. Hopkins, December 9, 1930.

31 Now on this 9th day of December, 1930, come the parties hereto, same as on yesterday, the defendant being present in person, and the jury being called and all being present the trial of said case is proceeded with; and the hour of adjournment having arrived and the trial of said case not being concluded, the jury is admonished of its duties by the court and the further hearing of said case is postponed until tomorrow.

Marshal's Return of Service on Defendant of Copy of Order Endorsing Additional Witness on Indictment.

Order.

32 Now on this 28th day of November, A. D. 1930, on application of the U. S. Attorney for the District of Kansas.

It is hereby ordered, that the name of Frank Hall, Kansas City, Missouri, be indorsed on the indictment herein as a witness for the United States.

JOHN C. POLLOCK, Judge.

Endorsed: No. 5473. Filed Nov. 28, 1930, F. L. Campbell, Clerk.

United States of America, District of Kansas—ss.

I, F. L. Campbell, Clerk of the United States District Court in and for the District of Kansas, do hereby certify that the annexed and foregoing is a true and full copy of the original order dated November 28, 1930, endorsing name of additional witness on Indictment in the case of United States v. Chas. A. Shepard, No. 5473, now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Kansas City this 1st day of December, A. D. 1930.

(Seal) F. L. CAMPBELL, Clerk,
By ADALINE WHITE, Deputy Clerk.

United States Marshal's Return District of Kansas, Second Division.

Received this writ December 1st, 1930, Kansas City, Kansas. Executed the same by delivering personally to the within named Chas. A. Shepard, a true and certified copy of this writ with all endorsements thereon, at Kansas City, Kansas, December 1st, 1930, 1:45 P. M.

DONALD H. MACIVOR, ESQ.,
33 United States Marshal,
By FRANK S. BOONE, Deputy.

Fees and costs $2.00.

Filed in the District Court on December 9, 1930.

Journal Entry of Trial Before Judge Richard J. Hopkins, December 10, 1930.

Now on this 10th day of December, 1930, come the
34 parties hereto, same as on yesterday, the defendant being present in person, and the jury being called and all

being present the trial of said case is proceeded with; and the hour of adjournment having arrived and the trial of said case not being concluded the jury is admonished of its duties by the court and the further hearing of said case is postponed until tomorrow.

Journal Entry of Trial Before Judge Richard J. Hopkins, December 11, 1930.

35 Now on this 11th day of December, 1930, come the parties hereto, same as on yesterday, the defendant being present in person, and the jury being called and all being present the trial of said case is proceeded with; and the hour of adjournment having arrived and the trial of said case not being concluded the jury is admonished of its duties by the court and the further hearing of said case is postponed until tomorrow.

Journal Entry of Trial Before Judge Richard J. Hopkins, December 12, 1930.

36 Now on this 12th day of December, 1930, come the parties hereto same as on yesterday, the defendant being present in person, and the jury being called and all being present the trial of said case is proceeded with; and the hour of adjournment having arrived and the trial of said case not being concluded the jury is admonished of its duties by the court and the further hearing of said case is postponed until tomorrow.

Journal Entry of Trial Before Judge Richard J. Hopkins, December 13, 1930.

37 Now on this 13th day of December, 1930, come the parties hereto the same as on yesterday, the defendant being present in person and the jury being called and all being present, the trial of said case is proceeded with; thereupon the plaintiff having introduced all its testimony rested at 10:40 o'clock a. m., thereupon the defendant presented his Motion for a Directed Verdict; thereupon the Court being fully advised in the premises finds said Motion should be and the same is hereby overruled and denied, to which

order and ruling of the court the defendant excepted and excepts; thereupon the hour of adjournment having arrived and the trial of said case not being concluded, the jury is admonished of its duties by the Court and the further hearing of said case is postponed until Monday, December 15, 1930.

Motion for Directed Verdict.

Defendant moves the Court to direct a verdict of
38 not guilty upon the evidence offered by plaintiff, for the reason that said evidence fails to prove the guilt of defendant with the degree of certainty required by law.

C. L. KAGEY,
L. M. KAGEY,
H. S. CLASS,
KEEFE O'KEEFE,
Attorneys for Defendant.

Filed in the District Court on December 13, 1930.

Journal Entry of Trial Before Judge Richard J. Hopkins, December 15, 1930.

Now on this 15th day of December, 1930, come the
39 parties hereto same as on December 13, 1930, the defendant being present in person and the jury being called and all being present, the trial of said case is proceeded with; and the hour of adjournment having arrived and the trial of said case not being concluded the jury is admonished of its duties by the court and the further hearing of said case is postponed until tomorrow.

Journal Entry of Trial Before Judge Richard J. Hopkins, December 16, 1930.

Now on this 16th day of December, 1930, come the
40 parties hereto, same as on yesterday, the defendant being present in person, and the jury being called and all being present the trial of said case is proceeded with; and the hour of adjournment having arrived and the trial of said case not being concluded, the jury is admonished of its duties by the court and the further hearing of said case is postponed until tomorrow.

Journal Entry of Trial Before Judge Richard J. Hopkins, December 17, 1930.

41 Now on this 17th day of December, 1930, come the parties hereto, the United States appearing by S. M. Brewster, United States Attorney and L. E. Wyman, Assistant United States Attorney, and the defendant Charles A. Shepard appearing in person and by C. L. Kagey, Harry S. Class and L. M. Kagey, his attorneys, Keefe O'Keefe having withdrawn from the case, and the jury being called and all being present, the trial of said case is proceeded with; thereupon the hour of adjournment having arrived and the trial of said case not being concluded, the jury is admonished of its duties by the court and the further hearing of said case is postponed until tomorrow.

Journal Entry of Trial Before Judge Richard J. Hopkins, December 18, 1930.

42 Now on this 18th day of December, 1930, come the parties hereto same as on yesterday, the defendant being present in person and the jury being called and all being present the trial of said case is proceeded with; thereupon the defendant having introduced all his evidence rests; and the hour adjournment having arrived and the trial of said case not concluded, the jury is admonished of its duties by the court and the further hearing of said case is postponed until tomorrow.

Journal Entry of Trial Before Judge Richard J. Hopkins, December 19, 1930.

43 Now on this 19th day of December, 1930, come the parties hereto same as on yesterday, the defendant being present in person and the jury being called and all being present the trial of said case is proceeded with; thereupon by leave of court and consent of counsel for the Government, defendant is granted leave to and does introduce further testimony and such further testimony having been introduced the defendant rests his case. Thereupon the defendant presents his Motion for a Directed Verdict and the Court having heard the arguments of counsel on said Motion and being well advised in the premises finds said Motion

should be and the same is hereby overruled and denied; to which order and ruling of the court the defendant excepted and excepts.; and the hour of adjournment having arrived and the trial of said case not being concluded, the jury is admonished of its duties by the court and the further hearing of said case is postponed until tomorrow.

Motion for Directed Verdict at Close of Case.

Comes now the defendant and moves the court to
44 direct the jury to return a verdict of not guilty in the above-entitled cause for the reason that the testimony introduced upon the trial fails to prove the guilt of the defendant to the degree of certainty required by the law, and that the evidence is insufficient to support any other kind of verdict.

HARRY S. CLASS,
C. L. KAGEY,
L. M. KAGEY,
Attorneys for Defendant.

Filed in the District Court on December 19, 1930.

Journal Entry of Trial Before Judge Richard J. Hopkins, December 20, 1930.

Now on this 20th day of December, 1930, come the
45 parties hereto same as on yesterday, the defendant being present in person and the jury being called and all being present the trial of said case is proceeded with and the jury having heard the evidence, arguments of counsel and the instructions of the court retires in charge of its sworn bailiff to consider its verdict.

Journal Entry of Trial Before Judge Richard J. Hopkins, December 22, 1930.

Now on this 22nd day of December, 1930, come the
46 parties hereto same as on December 20th, 1930, the defendant being present in person, thereupon the jury returns into open court and through its Foreman presents the following verdict, to-wit:

"In the District Court of The United States for the District of Kansas, First Division. The United States v. Charles A. Shepard, No. 5473. We, the jury in the above entitled cause, duly impaneled and sworn, upon our oaths find the defendant Charles A. Shepard guilty as charged in the Indictment, without capital punishment. W. A. Payne, Foreman."

Thereupon the jury is discharged from further consideration of this case and from further attendance at this term.

Thereupon the defendant asks and is given leave by the Court to file Motion for New Trial within ten days, and on Motion of the defendant the District Attorney consenting thereto, it is ordered by the Court that judgment and sentence on the verdict of guilty returned herein be and the same is hereby postponed until Monday, February 2, 1931, at Topeka, in said District and it is further ordered by the Court, the District Attorney consenting thereto, that the defendant be at large on his present bond herein until the imposition of judgment and sentence.

Motion in Arrest of Judgment.

Now on this 29th day of December, 1930, comes
47 Charles A. Shepard, defendant in the above entitled action, by his attorneys, Harry S. Class, C. L. Kagey, L. M. Kagey and Keefe O'Keefe, and moves that the judgment in the above entitled cause be arrested as to him, the said defendant, upon the following grounds and for the following reasons:

On the face of the record, the pleadings, and the evidence, there is insufficient evidence to sustain or support a verdict of "guilty," and the verdict of the jury is contrary to the uncontradicted evidence in the case.

HARRY S. CLASS,
C. L. KAGEY,
L. M. KAGEY,
KEEFE O'KEEFE,
Attorneys for Defendant.

Filed in the District Court on December 30, 1930.

Motion for a New Trial.

Comes now the defendant by Harry S. Class, C. L.
48 Kagey, L. M. Kagey and Keefe O'Keefe, his attorneys, and moves the court to grant him a new trial in the above entitled cause for the following reasons, to-wit:

1. On account of matters which occurred in said trial prejudicial to the defendant before the jury and which prevented him having a fair and impartial trial in this: Defendant was not permitted to examine certain of the jurors who were sworn to answer questions and who were excused by the court over the objection and exception of defendant without said jurors having an opportunity to testify as to whether they were qualified to sit as jurors in the case. Also, because the court, during the progress of the trial, refused to permit the defendant to make objections to questions and refused to permit the defendant to be heard upon objections to the evidence, and further, that the court, without just cause, rebuked the counsel for defendant and intimated to the jury that counsel were and had been guilty of misconduct in the trial of said cause.

2. The court erred in admitting the testimony of the witnesses, Nurse Brown and Sergeant Gresser, over the objection of the defendant as to certain transactions and conversations alleged to have been had by said witnesses with Zenana Shepard after she had been taken ill and before her death, such conversations not having been had in the presence of the defendant, and wholly incompetent and improper.

3. The court further erred in admitting in evidence a large number of letters and telegrams, all of which were sent and received more than two months after the death of said Zenana Shepard, all of which letters and telegrams were incompetent for the reason that they were too remote and did not prove or tend to prove any issue in the case.

4. The court erred in permitting the Government
49 to introduce as evidence a large number of exhibits of certain presents alleged to have been given by the defendant to one Grace Brandon after the death of the wife of defendant, all of which evidence is incompetent for the reason that it was too remote and did not prove or tend to prove any issue in the case.

5. The court erred at the trial in admitting illegal evidence over the objections and exceptions of the defendant other than that referred to in the foregoing grounds of this motion, to all of which rulings the defendant excepted.

6. The *defendant* erred in refusing to permit the defendant to object to the introduction of evidence at divers times during the trial of said cause and in refusing to permit the defendant to except to such rulings.

7. The court erred in excluding proper evidence offered by the defendant, to the prejudice of defendant and over the exceptions of defendant.

8. The court erred in summing up the facts to the jury at the conclusion of the trial in that the evidence was not stated fairly and accurately and that which was favorable to the accused was not commented upon in the same manner as that which was unfavorable.

9. The verdict was not supported by the evidence in the case.

10. The verdict of the jury was contrary to the evidence.

11. The evidence did not prove the guilt of the defendant to the degree of certainty required by law.

12. Misconduct of the United States Attorney in his closing address to the jury in this case by deliberately, intentionally and continually misquoting the evidence in the case over the objection and exception of defendant.

13. The District Attorney in stating the case to the jury made statements that were prejudicial to the defendant, stated matters which were not within the issues of the case, and such statements had a tendency to inflame the jury
50 against the defendant and did prevent him from obtaining a fair and impartial trial at their hands.

14. The court erred in overruling the motion of the defendant for an instructed verdict at the conclusion of the Government's evidence.

15. The court erred in overruling the motion of the defendant for an instructed verdict of "not guilty" at the conclusion of all of the evidence in the case.

16. On account of prejudicial remarks of the court at and during the trial of the case which caused the jury, or had a

tendency to cause the jury to think and believe that the attorneys for defendant were guilty of misconduct in conducting his defense, to his prejudice, and thereby preventing the defendant from having a fair and impartial trial.

17. Misconduct of the District Attorney in commenting upon the evidence of defendant, and of defendant's conduct of his defense, in the presence of the jury and thereby preventing the defendant from having a fair and impartial trial.

Wherefore, the defendant prays that the court set aside the verdict of the jury and discharge the defendant for the reason that the evidence produced upon the trial did not warrant a verdict of "guilty". Should the court refuse to discharge him, as heretofore prayed, then that the court set aside the verdict of the jury and grant him a new trial.

Dated December 29, 1930.

HARRY S. CLASS,
C. L. KAGEY,
L. M. KAGEY,
KEEFE O'KEEFE,
Attorneys for Defendant.

Filed in the District Court on December 30, 1930.

Supplemental Motion for a New Trial.

51 The defendant files this additional and supplemental motion for a new trial, and in addition to the grounds set out in the motion heretofore filed on December 30, 1930, says:

18. The court erred in permitting the District Attorney during the course of the trial to demand in open court from defendant and his counsel that they produce certain letters referred to by the District Attorney which were not in evidence and which were not in the possession of the defendant and his counsel, and also in permitting the District Attorney in the close of his argument to comment upon said transaction, and to misquote what had transpired on said occasion, all of which was duly excepted to by defendant.

C. L. KAGEY,
HARRY S. CLASS,
L. M. KAGEY,
KEEFE O'KEEFE,
Attorneys for Defendant.

Order of Judge Hopkins Taking Motion for New Trial Under Advisement.

52 Now on this 2nd day of February, 1931, come the parties hereto, the United States appearing by S. M. Brewster, United States Attorney and L. E. Wyman, Assistant United States Attorney and the defendant Charles A. Shepard being present in person and by C. L. Kagey, Harry S. Class and L. M. Kagey, his attorneys; thereupon the Motion for New Trial comes on for hearing and the Court having heard the arguments of counsel takes said case under advisement.

Journal Entry of Judgment and Sentence Entered by Judge Richard J. Hopkins.

53 Now on this 3rd day of February, 1931, come the parties hereto, the United States appearing by S. M. Brewster, United States Attorney and L. E. Wyman, Assistant United States Attorney, the defendant Charles A. Shepard appearing in person and by C. L. Kagey, Harry S. Class and L. M. Kagey, his attorneys; thereupon comes on for decision defendant's Motion for New Trial and Motion in arrest of Judgment and the Court having heard the arguments of counsel and considered said Motions and being well advised in the premises finds said Motions should be and they are each hereby overruled and denied, to which order and ruling of the Court the defendant excepts.

Thereupon the United States Attorney moves the Court for judgment and sentence on the Verdict of guilty heretofore returned herein; thereupon the Court inquired of the defendant if he had any good reason to offer why the judgment and sentence of the Court should not now be pronounced against him upon the Verdict of guilty herein, to which inquiry the defendant Charles A. Shepard replied he is not guilty of the charge for which he stands convicted.

Thereupon, it is now here by the Court considered, ordered and adjudged that the defendant Charles A. Shepard on the Verdict of guilty returned herein be imprisoned in the United States Penitentiary at Leavenworth, Kansas, for the period of his natural life, to which judgment and sentence the defendant excepts.

Thereupon the defendant moves the Court for time within which to prepare and file his Bill of Exceptions herein and to fix the amount of supersedeas bond, and it is by the Court ordered that defendant have ninety days from this date in which to prepare and file his Bill of Exceptions and that the supersedeas bond on appeal be and the same is hereby fixed in the sum of $20,000.00.

Petition for Appeal.

To the Honorable Richard J. Hopkins, Judge of the United States District Court for the District of Kansas.

Comes now your petitioner, Charles A. Shepard,
54 defendant in the above entitled cause, and respectfully shows to your Honor:

1. That judgment and sentence has been rendered against your petitioner in favor of the United States of America in the above entitled cause.

2. That in the record and proceedings of said cause, manifest error has happened to the great damage of your petitioner as appears from his assignment of errors and prayers for reversal presented and filed herein.

3. That by the law of the United States, your petitioner is entitled to have his cause reviewed on appeal in the United States Circuit Court of Appeals for the Tenth Circuit, and this cause is within the appellate jurisdiction of said Court.

Wherefore, your petitioner prays your Honor to allow him an appeal returnable to the United States Circuit Court of Appeals for the Tenth Circuit in the manner and within the time prescribed by law and the rules of this Court; that your Honor may sign a citation presented herein and the same may be served, may grant unto your petitioner a supersedeas in stay of the proceedings herein pending the determination of such appeal, and for all other proper relief.

KAGEY & KAGEY,
HARRY S. CLASS,
KEEFE O'KEEFE,
Attorneys for Defendant.

Allowed February 3, 1931. Richard J. Hopkins, District Judge.

Filed in the District Court on February 3, 1931.

Assignment of Errors.

55 Comes now the defendant, Charles A. Shepard, in connection with and as a part of his petition and application for appeal herein and makes and presents the following assignment of errors which he avers occurred at the trial of this cause and in the proceedings prior and subsequent thereto and upon which he relies to reverse the verdict and sentence rendered in this cause as appears in this, to-wit:

1. On account of matters which occurred in said trial prejudicial to the defendant before the jury and which prevented him having a fair and impartial trial in this: Defendant was not permitted to examine certain of the jurors who were sworn to answer questions and who were excused by the court over the objection and exception of defendant without said jurors having an opportunity to testify as to whether they were qualified to sit as jurors in the case. Also, because the court, during the progress of the trial, refused to permit the defendant to make objections to questions and refused to permit the defendant to be heard upon objections to the evidence, and further, that the court, without just cause, rebuked the counsel for defendant and intimated to the jury that counsel were and had been guilty of misconduct in the trial of said cause.

2. The court erred in admitting the testimony of the witnesses, Nurse Brown and Sergeant Gresser, over the objection of the defendant as to certain transactions and conversations alleged to have been had by said witnesses with Zenana Shepard after she had been taken ill and before her death, such conversations not having been had in the presence of the defendant, and wholly incompetent and improper.

3, The court further erred in admitting in evidence a large number of letters and telegrams, all of which were sent and received more than two months after the death of said Zenana Shepard, all of which letters and telegrams were incompetent for the reason that they were too remote and did not prove or tend to prove any issue in the case.

4. The court erred in permitting the Government to introduce as evidence a large number of exhibits of certain presents alleged to have been given by the defendant to one Grace

Brandon after the death of the wife of defendant, all
56 of which evidence is incompetent for the reason that it was too remote and did not prove or tend to prove any issue in the case.

5. The court erred at the trial in admitting illegal evidence over the objections and exceptions of the defendant other than that referred to in the foregoing grounds of this motion, to all of which rulings the defendant excepted.

6. The defendant erred in refusing to permit the defendant to object to the introduction of evidence at divers times during the trial of said cause and in refusing to permit the defendant to except to such rulings.

7. The court erred in excluding proper evidence offered by the defendant, to the prejudice of defendant and over the exceptions of defendant.

8. The court erred in summing up the facts to the jury at the conclusion of the trial in that the evidence was not stated fairly and accurately and that which was favorable to the accused was not commented upon in the same manner as that which was unfavorable.

9. The verdict was not supported by the evidence in the case.

10. The verdict of the jury was contrary to the evidence.

11. The evidence did not prove the guilt of the defendant to the degree of certainty required by law.

12. Misconduct of the United States Attorney in his closing address to the jury in this case by deliberately, intentionally and continually misquoting the evidence in the case over the objection and exception of defendant.

13. The District Attorney in stating the case to the jury made statements that were prejudicial to the defendant, stated matters which were not within the issues of the case, and such statements had a tendency to inflame the jury against the defendant and did prevent him from obtaining a fair and impartial trial at their hands.

14. The court erred in overruling the motion of the defendant for an instructed verdict at the conclusion of the Government's evidence.

15. The court erred in overruling the motion of the defendant for an instructed verdict of "not guilty" at
57 the conclusion of all of the evidence in the case.

16. On account of prejudicial remarks of the court at and during the trial of the case which caused the jury, or had a tendency to cause the jury to think and believe that the attorneys for defendant were guilty of misconduct in conducting his defense, to his prejudice, and thereby preventing the defendant from having a fair and impartial trial.

17. Misconduct of the District Attorney in commenting upon the evidence of defendant, and of defendant's conduct of his defense, in the presence of the jury and thereby preventing the defendant from having a fair and impartial trial.

18. The court erred in permitting the District Attorney during the course of the trial to demand in open court from defendant and his counsel that they produce certain letters referred to by the District Attorney which were not in evidence and which were not in the possession of the defendant and his counsel, and also in permitting the District Attorney in the close of his argument to comment upon said transaction, and to misquote what had transpired on said occasion, all of which was duly excepted to by defendant.

19. The court committed an error apparent from the record in overruling defendant's motion in arrest of judgment and for a new trial.

KAGEY & KAGEY,
HARRY S. CLASS,
KEEFE O'KEEFE,
Attorneys for Defendant.

Filed in the District Court on February 3, 1931.

[Appearance bond on Appeal in the sum of $20,000, Approved by the District Judge, with Appellant as principal and Charles E. Miller, Lillian B. Miller, John Littick and Earl Clark as sureties, was filed in the District Court on Feb. 5, 1931.]

Order Extending Time to File Bill of Exceptions.

Now on this 1st day of May, 1931, comes on for
66 hearing the verified application of the defendant herein for an order extending the time within which he may

prepare, serve, file and have certified his Bill of Exceptions for the purpose of having the United States Circuit Court of Appeals for the Tenth Circuit review the errors assigned in said appeal, the applicant appearing by his counsel, C. L. Kagey, Hal M. Black and Harry W. Colmery, and the Court having examined said verified application and the affidavits in support thereof and being fully advised in the premises finds that extraordinary circumstances beyond the control of the applicant have made it impossible, in the exercise of due diligence for him to prepare, serve and file his Bill of Exceptions on or before May 2, 1931, the expiration date of the time allowed by the trial Court for that purpose, and the Court further finds that application has been made to the Honorable Richard J. Hopkins, Judge of the United States District Court for the District of Kansas, for an extension of time, in which to prepare, serve, file and have certified said Bill of Exceptions and said Court has failed to act on said application, and the Court further finds that the liberty for life of the applicant will be seriously prejudiced and that he will be precluded from having the errors assigned, reviewed by the United States Circuit Court of Appeals for the Tenth Circuit unless the time within which said Bill of Exceptions may be prepared, served, filed and certified is extended, and that it will require approximately four months' time for the official reporter to prepare said transcript of the record.

Now, therefore, it is considered, ordered and decreed that the applicant be and he is hereby allowed four months
67 from May 1, 1931, within which to prepare, serve, file and have certified his Bill of Exceptions for his appeal to the United States Circuit Court of Appeals for the Tenth Circuit.

Dated at Wichita, Kansas, this first day of May, 1931.

JOHN C. POLLOCK,
United States District Judge,
District of Kansas.

ORIE L. PHILLIPS,
Judge, United States Circuit
Court of Appeals, Tenth Circuit.

Filed in the District Court on May 1, 1931.

Order of September 1, 1931, Extending Time Sixty Days for Filing Bill of Exceptions and Transcript of Record.

Now on this 1st day of September, A. D. 1931, it
68 is hereby ordered that sixty (60) days additional time from this date be allowed for signing, settling and filing Bill of Exceptions in this case and for filing transcript of record in the United States Circuit Court of Appeals for the Tenth Circuit.

RICHARD J. HOPKINS, Judge.

Praecipe for Transcript of Record.

To the Honorable Frank L. Campbell, Clerk of the above Court.

You are hereby requested to make a transcript of
69 record to be filed in the United States Circuit Court of Appeals for the Tenth Circuit, pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record the following, and no other papers and exhibits, to-wit:

1. The indictment.

2. The judgments and orders of the court.

3. The motion of the defendant for a directed verdict.

4. The assignment of errors.

5. The motion for a new trial, and the judgment of the court overruling same.

6. All other pleadings and orders of the court made in said cause.

7. This praecipe and service thereon.

Said transcript to be prepared as required by law, and the rules of this court, and the rules of the United States Circuit Court of Appeals for the Tenth Circuit, and to be filed in the office of the Clerk of the Circuit Court of Appeals at Denver, Colorado, on or before the 31st day of October, 1931.

Dated October 5, 1931.

C. L. KAGEY,
HAL M. BLACK,
L. M. KAGEY,
Attorneys for Appellant.

Service of the above praecipe accepted and acknowledged this 6th day of October, 1931.

S. M. BREWSTER, Attorney for Appellee.

Filed in the District Court on October 9, 1931.

Order of October 24, 1931, Extending Time Thirty Days for Filing Bill of Exceptions and Transcript of Record.

70 Now on this 24th day of October, A. D. 1931, it is hereby ordered that thirty (30) days additional time in addition to that previously granted, be allowed for signing, settling and filing Bill of Exceptions in this case and for filing transcript of record in the United States Circuit Court of Appeals for the Tenth Circuit.

RICHARD J. HOPKINS, Judge.

Order of December 22, 1931, Extending Time to January 20, 1932 for Filing Bill of Exceptions and Transcript of Record.

71 Now on this 22nd day of December, A. D. 1931, it is hereby ordered that defendant have until January 20, 1932, for signing, settling and filing Bill of Exceptions in this case and for filing Transcript of Record in the United States Circuit Court of Appeals for the Tenth Circuit.

RICHARD J. HOPKINS, Judge.

Order of January 16, 1932, Extending Time to February 10, 1932, for Filing Bill of Exceptions and Transcript of Record.

72 Now on this 16th day of January, A. D. 1932, it is hereby ordered that defendant have until February 10th, 1932, for signing, settling, and filing a Bill of Exceptions in this case, and for filing transcript of record in the United States Circuit Court of Appeals, for the Tenth Circuit.

RICHARD J. HOPKINS, Judge.

BILL OF EXCEPTIONS.

Be it remembered, that heretofore the Grand Jury
73 of the United States in and for the District of Kansas, First Division, did find and return to and before the above entitled court its indictment against the defendant, Charles A. Shepard, and that at the December term of the District Court of the United States for the District of Kansas, First Division, the defendant named above on the 4th day of December, 1930, being then and there arraigned in person, appeared and pleaded not guilty of said indictment.

Thereafter, on the 4th day of December, 1930, the above cause came on for trial before the Honorable Richard J. Hopkins, a judge of said court, and a jury duly impanelled, S. M. Brewster, L. E. Wyman, Dan B. Cowie and Donald C. Little appearing as counsel for the United States, and Harry S. Class, C. L. Kagey, Lloyd M. Kagey and Keefe O'Keefe appearing as counsel for the defendant.

In impanelling the jury the court, over the objections and exceptions of counsel for the defendant, excused a large number of jurors because they had read some article in the Kansas City Star. The jurors who were excused over the objections and exceptions of the defendant were examined and testified as follows:

Scott N. Dudley, sworn, examined as follows:

74 The Court: Q. Mr. Dudley, where do you live?

A. Clay Center, Kansas.

Q. Your business?

A. Merchant.

Q. How long have you lived there?

A. 59 years.

Q. Have you read or heard what purported to be a statement of the facts in this case?

A. I read the articles in the papers, in the Star.

Q. How long since did you read these articles?

A. Just these late articles, the last three or four days.

Q. You have read those?

A. Yes.

Q. You read the article in the Star the night before last, did you?

A. I think it was about that time.

Q. Yes. A three- or four-column article, supposed to be a statement by the defendant?

A. Yes.

Q. And, from a reading of that article, did you form or express some opinion in the case?

A. No, as to the facts of the case, I just read the article.

Q. You read the entire article—

A. Yes.

Q. —you think?

A. Yes.

Q. And you think you formed no impression or opinion from that?

A. No.

Q. —as to the guilt or innocence of the defendant?

A. No, sir.

Q. And you have no opinion now going to the guilt or innocence of the defendant. Have you any bias or prejudice, either for or against, the infliction of the death penalty, if the facts—

A. No.

Q. justify it?

A. No, sir.

Q. Could you render a fair and impartial verdict under the law and the evidence, if you were retained as a juror?

A. I think I could.

Q. And you would render such a verdict?

A. Yes, sir.

The Court: You may inquire.

Mr. Brewster: In reading this article—you read the article, now you remember something about it, do you not?

A. Oh, yes.

Q. And, you have at this time a distinct recollection of what this article said the defendant claimed to be the facts. Would you be able to entirely disregard that, when you went into the jury box?

A. I think I would; yes, sir.

Q. Would you be in just the same position now, with reference to this case, in listening to the government's testimony and to the defendant's, as if you had never heard his statement or what purported to be his statement?

A. A person might think of the statement.

Q. You would always have that in your mind, in deter-

mining the weight to be given to the government's testimony, would you not?

A. I think a person would consider it.

Mr. Brewster: I challenge the juror for cause.

The Court: I guess you may be excused.

Mr. Kagey: May I ask one question, just one question?

The Court: Yes.

Mr. Kagey: Q. Is your mind is such a condition that you could put entirely aside any impression that you may have gained from reading the article, and decide the ques-
75 tion of the defendant's guilt or innocence solely upon the evidence offered here on the witness stand?

A. Yes, sir.

Q. And, enlightened, of course, by the instructions of the court as to the law. Would that article cause you to have any feeling of bias for or prejudice against either the government or the defendant in this case?

A. No, sir.

Q. Do you think your mind is in such a condition that you would make an absolutely fair and impartial juror, as between the government and the defendant?

A. Yes, sir.

Mr. Kagey: We resist the challenge.

Mr. Brewster: Let me ask one question.

Q. At the time you read it, and up to this time, you assumed it was his statement, thought to be his statement?

A. Thought to be his statement.

Q. Yes; and you believed that?

A. Yes, sir.

Q. So that you are in the position, practically, of having heard this communication, or believed you had heard a communication directly from the defendant, that went into the details of the case, are you not?

A. I supposed his statement—

Q. Well, you read the statement?

A. Yes, sir.

Q. And the statement set forth in two or three columns just what he claimed was the facts?

A. Yes, sir.

Q. And, at the time you read it, you believed that was his statement, did you not?

A. I thought it was his statement.

Q. You think so now?

A. I have no reason to think otherwise.

Q. You do go in there with the impression that the defendant in this case has, at least, made a public statement, setting out certain facts, do you not?

A. Yes.

Q. If that were contradicted, that would have some weight with you, would it not, the fact he had made one statement in the paper, and a contradictory statement, perhaps, on the witness stand?

Mr. Kagey: Wait a moment; we object to that question as improper and argumentative.

The Court: I think I will excuse the juror. We will, I think, be able to get jurors who have not read a statement of the facts in the case. You may be excused.

Mr. Kagey: We note an exception.

The Court: Call another.

Joe Casey sworn, examined as follows:

The Court: Q. Where do you live, Mr. Casey?

A. Norton, Kansas.

Q. What is your business?

A. Right now, I am in the hardware and implement business.

Q. How long have you lived at Norton?

A. All my life.

Q. All your life. Are you a man of family?

A. No.

Q. You have no family. Your parents live there, do they?

A. No.

Q. Does your Mother live there?

A. Yes, sir.

Q. Have you heard or read what purported to be a statement of the facts in this case?

A. Yes, sir, I read about all that was in the papers.

76 Q. You have read the statement that has been referred to here, that was published in The Star the day before yesterday?

A. You mean, Mr. Shepard's statement?

Q. Yes, sir.

A. I think I read most of it.

Q. You think you did?

A. I read some statements that he made there.
Q. Yes.
A. Yesterday's Star, I think, or something like that.
Q. You took that to be his statement, did you?
A. Yes; I read it as his statement, as stated in the paper.
Q. Yes; and you formed some impression or opinion in your mind as to the facts he had there stated?
A. I do not know that I formed any opinion. I imagined that he would have some statements to make.
Q. Yes; and that those were his statements?
A. I supposed they were: yes.
The Court: Yes; you may be excused.
Mr. Kagey: Note an exception.

I. L. Lutz sworn, examined as follows:

The Court: Q. Where do you live?
A. Mankoto, Kansas.
Q. Mr. Luce, is it?
A. Lutz.
Q. Lutz, oh, yes. What is your business, Mr. Lutz?
A. Wholesale produce.
Q. Mr. Lutz, how long have you lived at Mankoto?
A. 26 years.
Q. Are you a man of family?
A. Yes, sir.
Q. Have you heard or read what purported to be a statement of the facts in this case?
A. Yes, sir.
Q. How recently have you read those statements?
A. Since I have been down here, Monday morning, I think it was.
Q. It has been this week—
A. Yes.
Q. —since you came down here as a juror? Did you read the statement in The Star that has been referred to here?
A. I did not hear what he said back there.
Q. Did you read a statement supposed to have been by the defendant that appeared in The Kansas City Star?
A. Yes, sir.
Q. —the day before yesterday?
A. Yes, sir.

A. No.

Q. Had you read other articles before that time, and since?

A. I read some articles of The Star, I do not know, it was in July or in the summer, sometime.

Q. Yes. And, from what you may have read or may have heard did you form or express any opinion as to the guilt or innocence of the defendant?

A. None, other than what I always do when I read articles.

Q. That formed an opinion in your mind, did it?

A. Not a final opinion.

Q. And you read that article in detail, did you?

A. I did not read all of it.

Q. You did not read all of it?

Q. Not a final opinion?

A. No, sir.

Q. But it would take some evidence to remove that opinion, would it?

A. No it would not.

Q. It would not. That is not an abiding opinion in your mind?

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A. No, sir.

Q. You had none at the time you read any of these articles?

A. No, sir.

Q. And you have no opinion at this time?

A. No, sir.

Q. Do you have any bias or prejudice against the infliction of the death penalty—

A. No, sir.

Q. —if the facts justify it?

A. No, sir.

Q. Could you render a fair and impartial verdict under the law and the evidence, if you were retained as a juror?

A. Yes, sir.

Q. And would you do so?

A. Yes, sir.

The Court: You may inquire.

Mr. Brewster: Q. When you commence the trial of this case, would you commence it with the assumption that the statement in the paper was not the defendant's statement?

A. No; I would not.

Q. You do not know whether it was his or not?

A. I do not know whether it was his, or whether it is true.

Q. Regardless of whether it is true or not, would it have any effect on your verdict, if testimony should be introduced by either party, tending to contradict it?

A. Not a bit.

Q. You did not give it any attention or weight, at all?

A. Only as an article of interest, and read it.

Q. I will ask you if you did not believe that it was Mr. Shepard's statement?

A. Oh, yes, I assumed it was.

Q. What?

A. I assumed it was, The Star printed it.

Q. So, when you sit there in the box, you have in your mind what you assume to be a statement of Mr. Shepard as to all the facts of the case as he detailed them?

A. I did not read all of the article.

Q. How much did you read?

A. The heading and part of it, down probably half of the page, half of a column, or something like that.

Q. Half a column. Are you a man of family?

A. Yes.

Q. How much of a family?

A. Wife.

Q. What?

A. A wife.

Q. No children?

A. No children.

Q. How long have you been married?

A. 23 years.

Q. Did the court ask you about the death penalty?

A. I believe he did, yes.

Mr. Brewster: We challenge this juror. I think this is the situation, even if the defendant is concerned: the statement is in there, and they know it. It is just the same as if they talked with the defendant. If disproven, it cannot help but reflect on the defendant. If the defendant should deny those were the facts; that is, if he should state there was another statement of facts, different from that, that was there, then it would be just the same as if we put the evidence on to prove he made these statements to the newspaper. In other words, we may be forced to produce the evidence in reference to this newspaper article, and that statement. The juror assumes it is his statement, just as if he talked with him, as far as his mind is concerned.

The Court: I think the challenge is good.

78 Mr. Kagey: We resist the application for a challenge, and except to the ruling of the court.

The Court: Very well, you may be excused. Call another juror.

F. E. Browning sworn, examined as follows:

The Court: Q. Where do you live?

A. Jewell County.

Q. Jewell County?

A. Yes, sir.

Q. Near Mankato?

A. Northeast of Mankato, Webber.

Q. What is your business?

A. Hardware business.

Q. Hardware business?

A. Yes, sir.

Q. How long have you lived in Jewell County?

A. All my life.

Q. All your life. Have you read or heard what purported to be a statement of the facts in this case?

A. I have read the case.

Q. You have read the case? Did you read the article in The Kansas City Star day before yesterday, by the defendant, or supposed to be?

A. Yes, sir.

Q. You read that article. You read it in its entirety, did you?

A. Yes, sir.

The Court: You may be excused.

Mr. Kagey: We should like to ask a question, your Honor, just a very short question.

The Court: The court is of the opinion that the defendant may not put his statement in a newspaper and get it to all the jurors, and ask those jurors to sit in this case.

Mr. Kagey: We except to the remarks of the court, and wish to ask one question of the juror, to ascertain his state of mind, if your Honor will permit us to do so.

The Court: You will be excused.

Mr. Kagey: We except to the court's ruling.

The Court: Call another juror.

Mr. Kagey: —and the statement in the presence of the jurors.

Charles E. Warren sworn, examined as follows:

The Court: Q. Your name, please?
A. Charles E. Warren.
Q. Warren?
A. Warren, yes, sir.
Q. Yes. Where do you live, Mr. Warren?
A. Up at Hiawatha.
Q. Hiawatha?
A. Yes, sir.
Q. Have you read the newspapers during the last two or three days?
A. I have.
Q. Did you read that article in The Kansas City Star day before yesterday?
A. Yes, sir.
Q. —purporting to be a statement by the defendant?
A. Yes, sir.
Q. Did you read it in its entirety?
A. Yes, sir.
The Court: You may be excused.
Mr. Kagey: Just a moment—
The Court: There will be no questions.
79 Mr. Kagey: I want to say something to the court in the presence of counsel.
The Court: Yes. (Court and counsel confer.)

T. V. Harris sworn, examined as follows:

The Court: I did not get your name.
A. T. V. Harris.
Q. T. V. Harris. Where do you live, Mr. Harris.
A. Leavenworth.
Q. Have you heard or read what purported to be a statement of the facts in this case?
A. Yes, sir.
Q. —in the last few days?
A. Yes, sir.
Q. Which newspapers did you read?
A. The Leavenworth Times, and The Kansas City Star.

Q. You read the article in The Kansas City Star, of day before yesterday?

A. Yes, sir.

Q. —which alleged or is purported to be a statement by the defendant?

A. Yes, sir.

The Court: —and his counsel. You may be excused.

Mr. Kagey: Just a moment—

Mr. Brewster: Just to preserve the question—

The Court: How is that?

Mr. Brewster: Just to preserve the question, I would like to ask a question.

The Court: Yes, yes.

Mr. Brewster: Q. You were in the courtroom Monday when the case was called, among the jurors.

The Court: Yes. You will be excused.

Mr. Kagey: Note an exception.

The Court: Yes.

S. L. Shrimer sworn, examined as follows:

Q. Your name?

A. S. L. Shrimer.

Q. Where do you live?

A. Sumner County.

Q. Where did you go from to Sumner County?

A. The southern part of the state, I live in Sumner County.

Q. You never did live up in the northern part?

A. No, sir.

Q. Did you read this article?

A. Yes, sir.

Q. In The Star?

A. Yes, sir.

Q. And, in that article, that is the article that purported to give the statement of the facts?

A. I think so.

Mr. Brewster: We challenge for cause.

The Court: You may be excused.

Mr. Kagey: We note an exception.

Mr. Brewster: We would like, before this jury is finally sworn and for the purpose of the record and for the purpose of the court, to introduce in evidence this edition of the newspaper that carries the article.

The Court: Just for the court?
Mr. Brewster: Just for the court.
Mr. Kagey: We might save time; is the court
80 familiar with the article?
The Court: Yes. I had not read it, however, until it was called to our attention.
Mr. Kagey: Why introduce it in evidence, then?
Mr. Brewster: To show what the article is.
The Court: Yes.
Mr. Brewster: —on which the challenges were based.

W. E. Cain sworn, examined as follows:

Q. Where did you say you live, Mr. Cain?
A. Jefferson County, Perry.
Q. Did you read the article in The Star?
A. Yes, sir.
Q. In which there was set out what claimed to be the defendant's statement of the facts in the case?
A. Yes, sir, I read that article.
Q. Had you been in the jury room Monday morning as a juror?
A. Yes, sir.
Mr. Brewster: We challenge.
The Court: You may be excused.
Mr. Kagey: Note an exception.

P. N. Grim sworn, examined as follows:

Mr. Brewster: The court swore all of these jurors to answer questions?
The Court: Yes.
Mr. Brewster: I notice, in some instances, you omitted to ask about the acquaintances of the attorneys.
The Court: Yes.
Mr. Brewster: Will you ask the whole panel?
The Court: Yes, I will do that.
Q. I am not sure I got your name.
A. P. N. Grim.
Q. Where do you live, Mr. Grim?
A. Onaga, Pottawatomie County.
Q. Have you read what purported to be a statement of the facts in this case?
A. I read the Kansas City Star since I have been here.

Q. Did you the day before yesterday, and you were in the courtroom Monday, were you, when this case was called?

A. I was.

The Court: You may be excused.

Mr. Kagey: Note an exception.

The Court: Call another.

I. B. Morgan sworn, examined as follows:

Q. Mr. Morgan, where do you live?

A. Riley County.

Q. Riley; you live near Morganville? Is that your part of the country?

A. That is in Clay County.

Q. Do you live near there?

A. It is quite a ways.

Q. Are you related to the Doctor Morgan over there?

A. No, sir.

Q. Are you related to I. B. Morgan?

A. No, sir.

Q. Did you read this article in The Star?

A. Yes, sir.

Q. Did you read all of it?

81 A. Not all of it.

Q. How much of it did you read?

A. I read about a column, I guess.

Q. A column. Did you read what purported to be his statement of the facts in this case?

A. I read it.

Mr. Brewster: We challenge.

Q. You were a juror in the courtroom Monday?

A. Yes, sir.

The Court: Yes. You may be excused, Mr. Morgan.

Mr. Kagey: Note an exception.

A large number of jurors were called and examined as to their qualifications. The defendant exhausted all of his challenges. At the conclusion of the examination of the jury, and before the jury were sworn to try the case the defendant moved the court to quash the entire panel of jurors and asked that the jury be discharged from consideration of the case, which proceedings were as follows:

Mr. Kagey: We have a motion we want to make, but not in the presence of the jury.

The Court: Do you wish the jury excluded, or can you present your motion right here?

Mr. Kagey: I think I can present it right here.

The Court: Very well.

Mr. Kagey: Mr. Reporter, will you come up here and take the motion?

The defendant moves to quash the entire panel of jurors, and asks that the jury be discharged from consideration of the case, for the reason the defendant was not permitted to question a number of the jurors, whom the defendant contends might have been qualified as jurors in the case, and for the further reason that the court directed the attention of the jurors specifically to articles appearing, or that might have appeared, in the newspapers, and that such remarks on the part of the court were prejudicial to the rights of the defendant as to the jurors who were already in the jury box, and also as to the jurors who were present in the courtroom at the time of the statement with reference to said newspaper articles.

The Court: Overruled. And proceed. Let us not—

Mr. Kagey: And exception. For the further reason and objection that it is an exceptionable jury.

The Court: The court would like for you to explain what you mean by that? Let the record show that the court asks counsel what he means by that?

Mr. Kagey: The exceptions have been noted as to the reasons why the jury was not satisfactory.

The Court: They except because it is an exceptionable jury. I do not know what counsel means by that, except possibly an exceptionally good jury, and I want them to explain to the court what they mean by it.

Mr. Kagey: Do I understand that is overruled?

The Court: Yes.

Mr. Kagey: And an exception.

Mr. Harry S. Clase, Attorney for the defendant in
82 his statement to the jury before any evidence was offered by either government or defense stated:

"He made arrangements for flowers to be delivered by the florist in San Antonio, and he sent her a fox fur piece from

Denver, and he gave her what the women call, *what the women call* a pajama ensemble, along in February of 1930. That the major was in love with this woman, we certainly admit. That he wrote letters to her, we admit, and that she wrote letters to him, we will prove beyond any reasonable doubt. We will admit that he sent her some books. I think the testimony will show that most of these books, I think all of them, were books given the major by patients he treated, another natural thing. They were a lot of mystery plays, and detective stories, some novels, detective novels. I can not see anything unnatural or any improper inference to be drawn from the statement of General Brewster that the major had sent her some novels that had to do with detectives and chocolate poison cases, and, whatever it was, we will probably admit there were some books, and others, too.

"Then, in 1929, going back to that, a very natural thing, he sent his girl, Grace Brandon, a Christmas present, and this pajama ensemble, in February, 1930, sent to her for a birthday present in anticipation of their marriage, as we contend, a very natural thing to be done by any person."

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83 The United States, to maintain its case, offered the following testimony:

M. W. Ireland was called as a witness on behalf of the Government and testified as follows:

I am Surgeon General of the regular army. I first met Major Shepard in Los Angeles about June 25 or 26, 1929. I had a conversation with him. He had heard I was in the city and telephoned and asked if he might see me. He came up to the hotel and when he arrived said he was there on a sad mission, to bury his wife. He told me he wanted to be assigned as a Flight Surgeon and let it be known that he wanted to go to San Antonio. I told him I was not interested in having him assigned as Flight Surgeon, but was interested in his present condition of distress and would be glad to do anything I could for him. After a short conversation, I told him the Medical Corps had given all the surgeons to the air service we could spare and that the detail or assignment of surgeons to the air service as vacancies occurred was handled in the personnel division of my office, but before I left him I would like for him to say that if he could not

be assigned as a flight surgeon, if he then would want to leave Fort Riley, and he said he would not. The Major told me his leave was not up, but that he was going to go back to Fort Riley. He mentioned that he wanted to go to San Antonio or let me know that he wanted to go to the San Antonio Field. The Kelly Flying Field is four to six miles out of San Antonio and the Brooks Flying Fiels is there under the same command. My understanding is they adjoin each other. I afterwards received a telegram from him. The telegram was offered in evidence as Government's Exhibit 1, and read as follows:

"Received at Letterman Gen. Hospl. June 29th, 1929.
"Fort Riley, Kansas, June 28th, 1929.
"Surgeon General Ireland, care Commanding Officer, Letterman Gen. Hospl.

"Reconsideration application change of station stop If no possibility of assignment to air service would request transfer to station hospital Fort Sam Houston stop If this
84 not possible then prefer to remain here.

MAJOR C. A. SHEPARD."

Fort Sam Houston is about two miles from the center of San Antonio, Texas. I received a letter from Major Shepard in reference to the transfer. I do not have the original, it is in my office. I have a copy.

On cross examination General Ireland testified as follows: I know as a matter of fact that one of the largest flying fields the army has is located at San Antonio, and I understand that one of the largest flying fields in the world is being built there. The pay of a flight surgeon is considerably larger than that of an ordinary surgeon. It is fifty per cent more. I knew that at the time Major Shepard came to see me in Los Angeles that he had been graduated as a flight surgeon in Texas before that, and was eligible for duty if he should be reached. It did not surprise me that he wanted to enter the flying service, and when Major Shepard said he wanted to go to San Antonio, it was the most natural thing in the world to me, because, besides being a large field where he had been for instruction, in my estimation, Fort Sam Houston is the most attractive station in the United States because of climatic and other conditions. If the Major had

been assigned to Fort Sam Houston, even if he had not been assigned to the air service there, and had been on the ground, and an opening arose he would have been more apt to get it, because it is expensive to move an officer. We are always short of men and if everything were equal and if there was a vacancy at Fort Sam Houston and he wanted to go into the flying service, he would stand a much better show than the man at Fort Riley, because of the expense.

M. W. Ireland was then called out of turn on behalf of defendant and testified as follows: I saw Major Hawley sometime after June 15, 1929, in my office at Washington. It was sometime between July 22 and July 30, 1929. Major Hawley came into my office on his way to Nicaraugua. He
85 had a conversation with me about Major Shepard. He said he had been treating Mrs. Shepard and that her case was a most peculiar one, that they had never diagnosed a real cause of her failing. That they were convinced that she was suffering from a metallic poisoning, and he also said that Major Shepard's attitude was such that when Mrs. Shepard died they procured an order from the commanding general at Fort Riley for an autopsy. He did not tell me that he had taken charge of the viscera. He did not tell me that he had taken charge of the autopsy and had charge of the viscera and had taken it to Omaha in his automobile after the autopsy. I never saw Major Hawley after that until my arrival here at the courtroom. I am fairly familiar with the army regulations with reference to investigating the death of any person who is suspected of having met with foul play. I have not served in a fort since I left Fort Sam Houston in May, 1917, to go to France, but the proceedings at forts to investigate such incidents all come through my office. If an officer or an enlisted man met death under circumstances that could not be explained, a board of officers would be convened to investigate that. That is the custom in the army. I cannot tell you where the army regulation can be found offhand, but there is a regulation to that effect. (Major Ireland was here handed a book purporting to be a Manual for Courts Martial for the United States Army issued by the Judge Advocate General, and published by the direction of the President of the United States in 1928. His attention

was called to Article 113, page 228 and was asked if that was the regulation to which he had reference.) Yes, sir, it is. That is the rule promulgated by the War Department, no doubt about that. The articles of war are statute law, are authorized by statute law, and are made statute law. They are acts of the Congress of the United States. This was objected to by Mr. Brewster of counsel for the Government on the ground that it was incompetent and immaterial and not throwing any light upon the case. Then the following proceedings occurred:

The Court: Oh, but what materiality has it?

86 Mr. Kagey: What materiality?

The Court: Let me see it.

Mr. Kagey: I should be very glad to explain it to the court.

The Court: Objection sustained.

Mr. Kagey: Note an exception.

General Ireland further testified: I do not know whether the death of a civilian in an army post would come under the law with reference to coroners rather than a military court. I do not know whether it would be the civilian law or the military that would cover the case where a party had died who was not in the military service, but I can give you an example, if I may. The example I have in mind occurred at my post in the Philippines.

On cross examination, General Ireland testified further as follows: Major Hawley came to see me about the Shepard matter between July 22 and 30, 1929, about a month after I saw Major Shepard. He told me Mrs. Shepard had died under peculiar circumstances with symptoms that they did not understand, but they all believed, all the doctors who had seen her believed that she had died from metallic poisoning. At that time Major Hawley was an officer in good standing. He is senior medical officer in the Nicaraguan Canal survey. He told me at that time that Major Shepard's conduct had been peculiar and such as to arouse his suspicions and Colonel Grissinger's. Colonel Grissinger was a colonel in the medical corps and a senior medical officer at Fort Riley, Kansas. A military investigation in the way of a court martial is an entirely different thing than an investigation by autopsy. When that came to me I stopped all thought of transferring Major Shepard.

Walter R. Pick was called as a witness on behalf of the government and testified as follows:

I was formerly in the United States Army and am now retired. While I was in the Army, I was stationed at Fort Omaha, Nebraska, and while there was acquainted with Major Shepard and his wife, Zenana Shepard. I also visited them after they moved to Fort Riley, Kansas, on April 26, 1929. I took luncheon with them and during the course of the luncheon, I remarked relative to Mrs. Shepard's health, that she was looking well. I thought she looked better than when I last saw them at Fort Omaha.

No cross-examination.

Gertrude Skow called as a witness on behalf of the
87 government having been first duly sworn, testified as follows:

My name is Gertrude Skow. I now reside at Fort Riley, Kansas. My husband is an Army Officer in the Air Corps. We have resided at Fort Riley over four years. While residing at Fort Riley I became acquainted with Major Shepard, the defendant, and his wife, Zenana Shepard. I became acquainted with Mrs. Shepard in September, 1928, and Major Shepard just before Christmas, 1928. I recall Mrs. Shepard being seriously ill in May, 1929.

Q. When did you find out, that is, approximately what time of day, that she was seriously ill?

A. I called Major Shepard on the telephone, I called her quarters, my maid told me I had two calls from Mrs. Shepard in the afternoon. When I came home I suppose it was about 6:30, I called on the telephone for Mrs. Shepard, and Major Shepard answered the telephone and told me she was desperately ill.

In the morning of that same day I had a conversation with Mrs. Shepard in which she called me and asked me wanting me to go over to the Post Exchange, and into Junction City with her but I did not go because I had something else to do.

I really could not say the exact date I talked with Major Shepard but it was sometime around the first part of May if I remember correctly.

Q. In this telephone conversation that you had with Major Shepard do you recall approximately what time of day that was?

A. I think it was around seven o'clock.

Q. Just state what Major Shepard said to you at that time as nearly as you can recall.

A. I asked for Mrs. Shepard and he said she was desperately ill.

Q. Did he ask you to come down and see her?

A. I asked him if there was anything I could do for her and he said no, not at that time, the Doctor was there.

I went down to see her, I called Mrs. Gates who was another friend of ours and told her Mrs. Shepard was very ill and I thought we should go down and see if we could do anything for her. Mrs. Gates and I went down there together. When we arrived there we were met by Major Shepard. At that time we asked what the trouble was and Major Shepard said that she had been drinking and he thought she had gotten hold of some bad liquor. He said the Doctor was in there then. I told him if there was
88 anything we could do to be sure and let us know; to call me and I would be home; so we went home; I went to my house, and Mrs. Gates went to her home.

Later that evening I returned to the Shepard quarters. I think it was about nine o'clock Major Shepard called me on the telephone and asked me if I would come down and stay with her a little while, that he wanted to go up to the hospital to get a nurse. I went down there then. I do not remember the exact conversation I had with Major Shepard after I arrived; he asked me to come back into the bedroom where Mrs. Shepard was, and she was lying on the bed and I helped Major Shepard undress her and get her night clothes on. At that time I did not smell any alcohol on her. She was in bed with her clothes on. She was delirious. The pupils of her eyes were very large. She did not recognize me at that time. She did not recognize me at all that evening. I just remained there for a short time with Mrs. Shepard while Major Shepard went to the Hospital and then I went home. Major Shepard told me he had made arrangements for the nurse and he had to go in to Junction City around twelve o'clock when the train came in to meet the nurse and he asked me if I would come back then and stay with her. I did that. Major Shepard went for the nurse about twelve o'clock. I offered to go after the nurse, I asked him if it would be all right for me to go in and meet the nurse, that I did not know but what she might need a

Doctor; but Major Shepard said he would have to send some wires to her relatives and that he would rather go.

Major Strickler was there in the bedroom when I went in that time to help Major Shepard undress her.

Mrs. Shepard did not get up and leave the bed at any time while I was down there earlier at nine o'clock, but she did when I was with her around midnight. She went in the bathroom and vomited.

89. Q. Did Major Shepard say anything to you about what started her illness that night?

A. When I went to the door he said that earlier in the evening she had got hold of some bad liquor.

Q. Did he say anything further about whether or not she had collapsed and if so where?

A. Yes, he said she was lying on the couch in the living room and she went to get up and fell on the floor.

Q. Is that what he said was the way this happened?

A. He said that she had fallen on the floor, collapsed on the floor.

Cross Examination.

I cannot tell the exact time I was there the first time. I imagine I was there about fifteen or twenty minutes while he went to the Hospital to make the arrangements for the nurse. I stayed with her long enough for him to go to Junction City and get the nurse that evening. I stayed until the nurse arrived.

Constance Crowe Gates was called as a witness on behalf of the government and testified as follows:

I am residing at the present time at San Antonio, Texas. I am the wife of an Army officer in the Air Corps. During the first half of the year 1929 we were stationed at Fort Riley, Kansas. We resided in a single building about a quarter of a mile away from the apartment or court. I first became acquainted with Major Shepard in December, 1928, and with Zenana Shepard in September, 1928. I recall the serious illness of Mrs. Shepard sometime between May 10, and 15, 1929, but I am not sure of the date. I recall receiving a telephone call from Mrs. Skow and we went down to Major and Mrs. Shepard's quarters. Prior to going down to the Shepard's quarters the last time I had seen Mrs. Shepard she was driving into Junction City as I was returning from

town. It was about 6:15 in the evening. We went down to her quarters about seven o'clock, forty-five minutes after I had seen her. I did not go into the room when Mrs. Skow and I visited there that evening. I had a conversation with Major Shepard about ten days or two weeks after she took sick. The conversation took place in the kitchen and I asked him if he thought she was going to get well and also
90 what was the matter with her. He told me she had been drinking. He did not say bad liquor, but he did say that she had been drinking a great deal during her lifetime. I did not say anything. I was very much surprised. I have never noticed her drinking excessively during her lifetime. I have seen her refuse to drink.

There was no cross examination.

Samuel D. Sturgis, Jr., was called as a witness on behalf of the government and testified as follows:

I am an officer of the Corps of Engineers, United States Army and am now stationed at Fort Riley, Kansas. I knew Major Shepard and the location of his quarters. These quarters were located on the United States Military Reservation at Fort Riley, Kansas. Major Shepard lived on the first floor and the quarters were roughly about thirty by fifty feet. Major Shepard occupied the first floor and basement. Almost all of the quarters are about the same. (Witness identified government's Exhibit 5 as a plat of such Military Reservation at Fort Riley, Kansas, showing the quarters of Major Shepard on said Reservation where Zenana Shepard died. Government's Exhibit 5 received in evidence without objection.)

On cross examination, Samuel D. Sturgis, Jr., testified as follows:

This apartment is on a court in the shape of a quadrangel one end of which is incomplete. The road runs along the northeast side of the quadrangel, that is, the uncompleted side. This road runs approximately east and west. There is a driveway around the outside of the quadrangel.

Redirect examination: The hospital is located between two hundred fifty to three hundred yards from Major Shepard's quarters.

John C. Dye was called as a witness on behalf of the government and testified as follows:

I am a Major in the Medical Corps of the United States Army and now reside at Fort Warren, Wyoming. I graduated from North Carolina Medical. I had three years hospital work in private hospitals, post graduate work in the New York Eye and Ear Infirmary in New York, and
91 I have done eye, ear, nose and throat work since 1910.

I was called to attend Mrs. Shepard professionally in May, 1929. I was told to examine her eyes and upon an ophthalmic examination of the retina, I found the retina very much engorged with blood. I do not know the exact cause, but, in my opinion, it was due to toxemia, that is, an absorption of poison. The pupils were widely and equally dilated. I was called to see Mrs. Shepard again after that and saw her every day for probably a week. "When I first called to see her, her vision was bad; she could see outlines, but not definitely; she could not read, she could not see to read. This gradually improved, and after a week, or possibly ten days, it cleared up to where she could read and her pupils returned to normal. . . . Three or four days after it had returned to normal, I called back and her vision had failed again, but not to the extent it had the first time." That meant either reabsorption of more poison or overuse of the eyes in reading.

On cross examination, Major Dye testified: I do not recall whether it was Major Shepard or Major Hawley who called me to see Mrs. Shepard. I understood that Major Strickler had been called the night before and Major Hawley that morning. Major Strickler was present when I made this examination. Mrs. Shepard told me that she did not see distinctly. I did not know what kind of poison or poisons caused the condition, but I had been told that she had taken a lot of aspirin. I am unfamiliar with the symptoms of mercury poisoning. I have had very little experience with it. The cases of mercuric poisoning that I have seen I did not notice any symptoms in the eyes. I have never had occasion to examine the eyes of a person who has been drinking alcohol, but the effects of wood alcohol on the eyes are sudden and grain alcohol gradual. The eyes seldom return to normal from the effects of wood alcohol. I thought the cause of the eye condition was salicylic acid. The first time I examined

her eyes Major Shepard was present. I talked with Major Hawley about her eyes and told him it was salicylic acid. It was my understanding that he was the attending physician. Major Hawley asked me if I thought it could be due to arsenic and I told him I did not think so. I had this
92 conversation with Major Hawley either the day I examined her eyes or the day following. The treatment I recommended for her eye condition was a dose of calomel followed by salts, that she be kept in a dark room, that she use dark glasses and cold compresses to her eyes. Calomel contains mercury. It was easy to examine her eyes while they were dilated. I never made any examination of Mrs. Shepard's mouth. Major Rose told me that she received treatment for her mouth. (Stricken out by consent.) I made about ten or twelve visits during her last illness and I went to the hospital laboratory with Major Rose the day after she died. Major Shepard was there when I made visits and also there were other times when I was alone with Mrs. Shepard.

Q. Did you have any conversations with Mrs. Shepard at the time you were treating her for her eye trouble?

A. Yes, we talked on general subjects.

Q. What did she have to say?

Mr. Brewster: As to what?

Mr. Kagey: As to anything, during these conversations, when he was treating her, as to anything, as to anything.

Mr. Brewster: Well, put him on as your witness.

Mr. Kagey: No, sir, this is cross examination. He has testified to going there; he has testified to the symptoms and what she had to say is a part of the treatment of course.

The Court: That is what you are asking about?

Mr. Kagey: That is what I am asking about.

The Court: That was not your question.

Mr. Kagey: I think anything she said would be proper.

The Court: In regard to her treatment?

Mr. Kagey: Yes, in regard to her treatment, or what she said about the treatment, or anything of that sort; I do not care about any matter that would not relate to her illness.

A. I do not recall anything definitely she said, but she give me the impression that she was being annoyed by too much treatment.

Redirect examination: The other condition of the eyes I found, besides engorged blood vessels, were widely dilated

pupils. The muscles and muscular movements seemed
93 to be normal. I do not know personally whether she ever took any calomel or not. I never saw her take any aspirin. I said that was rumored. I do not think the condition of her eyes was caused by alcohol. I never did hear anyone dying from taking aspirin.

Paul R. Hawley was called as a witness on behalf of the government and testified as follows:

My name is Paul R. Hawley and I am a physician, an
94 officer in the Medical Corps of the United States Army. I am a Major in the Medical Corps of the United States Army, now stationed in Nicaragua, and I am Chief Surgeon of the Nicaragua Canal Survey. I graduated from the University of Cincinnati in 1914.

Q. What various posts have you been stationed at?

A. My first station was the Army medical school in Washington. From there I went to Ft. Collins, Kentucky. From there I went to Camp Taylor, Louisville, Kentucky. From there to Camp Sherman, Chillicothe. From there to Camp Mills. Thence to France, back to Ft. Benjamin Harrison. Thence to Camp Grant, Illinois. Thence again to the Army Medical School. Thence to Ft. Sheridan, Illinois. Thence to Johns-Hopkins University. Thence to Chicago, Ill. Thence to Philippine Islands. Thence to Ft. Riley. Thence to Nicaragua.

I was sent by the government for a year's study at Johns-Hopkins. In Chicago I was Assistant to the Corp Area Surgeon. I was Medical Inspector of the 6th Corp Area. I reported at Fort Riley about September 1, 1927, and remained at Fort Riley until July 22, 1929. I was never there more than once. I became acquainted with Major Shepard and his wife and remember that Major Shepard first came to Fort Riley the latter part of September or the early part of October, 1928, and my impression is that he stayed at Fort Riley from five days to a week. He returned to Fort Riley the latter part of December, 1928, and in a talk with him he told me he had been to the School of Aviation Medicine, Brook's Field, Texas. I knew Mrs. Shepard. After she came I saw her off and on during the fall of '28, the Spring of 1929 and occasionally until the time she was taken ill and from that time frequently until the day of her death. I would

recognize her picture if I saw it. The picture you hand me is Mrs. Shepard. My impression is that Mrs. Shepard was slightly more slender at the time I knew her than in this picture. Government Exhibit 6 identified as a picture of Mrs. Shepard, offered and received in evidence, the picture being taken in 1928. At the time I met Mrs. Shepard in the fall of 1928 she appeared in very good health, quiet, unassuming lady. She was an unusually well groomed woman in her personal habits as to dress. During all the time I
95 knew her that habit as to being well groomed continued even during her illness until she was so weak and indifferent to her surroundings that she could take no further notice. Major Shepard came to my office in late March or early April of 1929 and discussed Mrs. Shepard with me. He came into my office and said that he was having a great deal of trouble at home, that Mrs. Shepard was drinking very hard and that he did not know what to do about it and asked my advice. I told him I was very much surprised at that and that so far as I could think of anything at the time there was nothing I could do about it and that if he had any suggestion, anything I could do about it I should be very glad to do it, that I thought it was a domestic problem that he would have to settle. With reference to the truth of it and what I thought about it I said I was very much surprised to hear it, that I never would have thought it. I do not remember making any comment as to the truth of the statement. During the time I had seen Mrs. Shepard I never had seen at any time when I even thought she had one drink.

Q. As a physician were you more or less familiar with the gossip of the Fort?

A. I had been attending physician for the post for a year and in that capacity I had been compelled to listen to a great deal of gossip of the post.

Q. State whether at that time you had ever heard anything with reference to Mrs. Shepard's habits.

Mr. Kagey: Just one moment. We object to that as an improper way to prove reputation, and reputation would not be competent in any event, at least at this time.

The Court: Overruled, you may proceed.

Mr. Brewster: What did you say?

Mr. Kagey: He said overruled.

The Court: Overruled.

A. (Continuing.) I had never heard the slightest intimation of anything unusual in Mrs. Shepard's habits.

Captain Parson lived in the apartment above Major Shepard's. Captain McDonald lived in another apartment and I do not remember who occupied the fourth apartment. I do not know who the Senior officer was in charge of that particular set of apartments. I was consulted the second
96 time between two or four weeks after that by Major Shepard relative to a rash on his wife's face and neck. Major Shepard came to me again and asked me if I would go to Mrs. Shepard. I went with him on the way to lunch and stopped by his quarters. I saw Mrs. Shepard. As to her condition as to being sober or drunk, she was entirely sober and I saw no appearance in her then that would indicate a chronic and confirmed drinker of alcoholic liquors. She was around the house in a morning dress occupied with the usual household duties. My impression is she was straightening up the living room or had just come from the kitchen. She was surprised that I had come in and gave me the impression of having been interrupted in her household affairs. She had a rash. She was talking rationally. I next saw Mrs. Shepard on May 21st. Mrs. Shepard was in bed, weak, ill, gave a history as having vomited a great deal the evening before and throughout the night, was still nauseated, the pupils dilated, weak, had a slight mental confusion which could be penetrated, that is, she would answer intelligently if you repeated your questions and was in a general condition which might be a mild collapse or recovery from collapse. She apparently got better. The condition of confusion cleared up entirely so far as I was able to detect. As to how she seemed as being dangerous or seriously ill I had not the slightest idea what was the matter with her but from her general condition my impression was that she was not dangerously ill at that time. In that condition Major Shepard told me he had called the family long distance in California and some member or members of the family were coming to Fort Riley. At the time I had that conversation with Major Shepard it was my opinion there was not any indication that Mrs. Shepard was seriously or dangerously ill. Thirty-six or forty-eight hours later she began to get a sore mouth. The thing started as rather a general inflammation of the gum rather below the gum margin, then around the gum margin and from that

comparatively mild beginning progressed daily, daily became worse, eventually became very foul, very foul odor and
97 very strong. After the dentist had taken charge of the mouth condition I did not examine it carefully enough to describe the exact pathological in her mouth in the later stages of her illness. I do not know who had charge of this case. I was asked to go see Mrs. Shepard. Everybody else was asked and they were asked after I went to see Mrs. Shepard without consulting me and it was my opinion at the time which became strengthened that my position in the case was rather intolerable and that I was not in charge of her case. (The word "intolerable" stricken out on motion of defendant.) I never directly prescribed for Mrs. Shepard. The only suggestion I made in her treatment was made through Major Shepard. I may have signed a prescription for whiskey. After the mouth condition, to the best of my memory, the next significant thing in the case I can remember was a day or two in which she had considerable pain in her stomach. Major DuFrenne went to see Mrs. Shepard. Major Shepard, Major DuFrenne and I went in a car together. On the trip over there Major Shepard said to DuFrenne "I do not want you to repeat this to anybody but there is something about this case I want to tell you before you see Mrs. Shepard. She has been drinking very hard and is a chronic alcoholic." I cannot remember exactly what I said to that; that that was the lot of bunk and at least it had nothing to do with her present condition and that I wanted him to go over there with an open mind. I talked with Major Shepard frequently about calling in some other physician, at least two or more times. I said to him that I did not know what was the matter with her and apparently there was nobody who knew what was the matter with her and I thonght he should get the best internist he could get in this part of the country. I even suggested Dr. Bowen in Kansas City whom he could call. His answer I remember very distinctly. "All right, anything you say." To my knowledge he did not get him. The situation got there where I asked to be relieved from the case. I went to my Senior Officer, the Post Surgeon, Colonel Grissinger. I did not get relieved. At other times I suggested another physician be called in than where I mentioned
98 Dr. Bowen. I talked with Major Shepard in reference to any heart trouble. This was in the first week or ten days of Mrs. Shepard's illness when she was still in very

good condition, in Mrs. Shepard's presence Major Shepard told me that Mrs. Shepard had suffered from her heart for a number of years and he felt rather sure she had a miocarditis, a chronic inffammation, at least intimated a chronic inflammation of the heart muscles. I told him she had no evidence at this time of any such condition. I thought she had no such trouble because when she began to recover from her first low point on May 20th and 21st, for two or three days succeeding I took her blood pressure and she had a blood pressure of 160 systolic and the dystolic was 110, with the pulse elevated somewhat in rate but strong, full and regular. A weakened heart muscle could not and would not maintain itself against an elevated dystolic blood pressure without symptoms of failing heart of which she had none. She had no subjective symptoms of her heart of which she complained. My opinion as to the strength of her heart was strengthened. Mrs. Shepard stopped breathing—I would not be able to state but an appreciable time before her heart stopped beating. I was present at the time she died. I listened to her heart at that time with a stethoscope and listened to her breathing too and knew her breathing ceased first. Going back to her sickness I did at another time ask for another physician. I got one on my own initiative. I did not from Major Shepard. I can remember no other reply from Major Shepard than "Anything you say." I cannot remember how frequently that occurred. I said to Major Shepard that she was getting no better and I do not know what is the matter with her and apparently no one else knows what is the matter with her and I think we ought to get a damn good internist out here to look at her. He said "Anything you say." He did not get one. After this condition of pain in the stomach let up a while she had a series of many— I do not know, I was not present when that occurred, of intestinal hemorrhages. I got there afterwards. She was still bleeding from her
99 intestines at the time I saw her. I was asking for a specimen of urine, I was given a specimen of urine. I did not see it collected. As I remember Major Shepard brought it to the hospital. I do not know where he got it. There was a blood count taken. When I first saw her her blood count was 16, 17, 18,000, one of those three. That means white cells. Usually the subnormal is 7500 in which there may be a slight variation one way or the other of a

thousand or two without any normal change. As this condition continued the blood count rose steadily during her illness. The last report that I remember was around 80,000. That is high and unusual. All this time she had no fever that amounted to anything, the best I could get from seeing her and from the nurse and from Major Shepard she never at any time had a temperature of over 99.4. Normal temperature is 98.6. I never knew her to have a degree of fever. The reasons for increase in white corpuscles are indicated by several reasons for an increase in white blood cells, the most common is a re-action against infection in the body. It is one of the defense re-actions in the body. That has been disputed but not shown to be untrue. It has been said it is an end reason or result and rather the evidence of destructive processes rather than part of defense mechanism. Generally accepted it is a part of the defense mechanism of the body against infection. Another reason for the increase in white blood cells is a disease of the blood. A third reason the white blood count rises in mercurial poison. A certain number of corpuscles means a certain number or so many white corpuscles to a cubic millimeter of blood. After the hemorrhages closed the condition of Mrs. Shepard grew rapidly worse and on June 15th she died. My impression is there were no other serious hemorrhages besides the one I have spoken of, this series of hemorrhages. At times w found what is known as occult blood in the stool sometime after she had the hemorrhage there were reports negative as to occult blood in the stool. To the best of my memory she had no severe hemorrhage following that one series. Major Strickler is an army officer in the Medical Corp of the Army.
100 His specialty is said to be psychiatry. The first man there was a psychiatrist. I do not know when Major Dye saw her. I did not send for Strickler or Dye. I think I made a suggestion that the dentist be called to treat her mouth. I have no recollection of asking Major Rose personally to do it. I did not send for Major DuFrenne. I talked with Major Shepard about taking this woman to a hospital and he told me she did not want to go to a hospital and he could not do anything that she did not want to do. I wanted to get her to a hospital where if I was responsible for the case I would have absolute control of the case. If I got her to a hospital I could go ahead with a great deal less difficulty and without any complications. I could get more

laboratory examinations made in the case to throw some light. I do not remember how many times I suggested a hospital, it must have been at least a dozen times. Prior to the time the sore mouth condition developed and became severe with pus formation I talked with Major Shepard with reference to a couple of devitalized teeth.

Q. What did you tell Shepard?

A. Well, I was looking around for a straw to hang to. I found nothing in the case that held water with anything I had ever seen before. She had a couple of devitalized teeth. Major Shepard told me she had not consulted a dentist for several years. I had histories where very obscure ailments are caused by devitalized teeth and in order to rule that out at least, I wanted them out.

At that time in my opinion there was no evidence of any Vincent's Angina. I suggested the hospital to Shepard. He told me she did not want to go to the hospital and did not care to do anything in the case against her wishes. The dentist did not pull her teeth at home. The only thing I could think to do for Mrs. Shepard that had not been done was take the teeth out and I was rather insistent that they come out because I knew nothing else to do with her. The dentist refused to take them out in her home and he said "If you can get this patient to the hospital we will take the teeth out but I will not take them out in her home." There was a dead lock for eight or ten days as I remember before anything was done. Then we agreed to take her to the hospital and pull her teeth and let her come back home again immediately so we could get her to the hospital. That
101 was done. I do not know how long after that it was that this infection became foul. To my direct knowledge slides were not taken from her mouth. I examined slides that were said to have been made from the case. On one slide after searching for a long time I found one organism known as spirillum but there were no other bacilli that I could find. Vincent's Angina has various names, one other common name when it attacks a certain part of the body, when it attacks the mouth it is sometimes known as Trench Mouth. I cannot remember off hand any name when it attacks other parts of the body. About three days before Mrs. Shepard died, I had a conversation with Dr. Shepard in which an autopsy was mentioned. This conversation was on the

back porch, the little back stoop of Major Shepard's quarters. It made some impression on me. It was in the late afternoon probably between four and five o'clock. I had seen Mrs. Shepard for the second time that day. Major Shepard saw me, he followed me out of the house on to the back stoop and said "Major, what do you think of her?" I said, "Major, I think she is a damned sick woman and I do not think she is ever going to get better; that is only half of what is worrying me. The rest of it is I do not know what is the matter with her." He said, "We cannot have any autopsy."

Q. Had you suggested an autopsy?

A. I had not.

Q. What did he—what did you say to that?

A. I said I was not thinking of an autopsy right at this minute but since you brought the subject up I will tell you very frankly I will not sign a death certificate in this case without knowing more about it than I know now. He said "You can put anything on a death certificate; you do not have to know what is the matter with her to sign a death certificate." I said, "I have probably signed a lot of them that were wrong, but I thought they were right when I signed them."

That was the end of the conversation. I turned and walked away. At that time I had some suspicions as to what was wrong. I was present when Mrs. Shepard had a blood transfusion. I do not know of my own knowledge what was
102 done prior to that. Major DuFrenne was in charge of the blood transfusion. I know the family selected Major Shepard. Mrs. Shepard lived three and a half hours after the blood transfusions. After her death I went to the Post Surgeon, Colonel Grissinger, and as a result I went back and had a talk with Shepard. I said, "Major, Colonel Grissinger has sent me here to say to you that he will not have a death certificate signed in Mrs. Shepard's case without an order—without an autopsy and he directs me to say that he as Post Surgeon requests an autopsy." The Major said, "I promised Mrs. Shepard her body would not be touched after death and I will not consent to an autopsy." I said to him. "Do you wish me to carry that message to Colonel Grissinger?" He said, "I do." I reported to Colonel Grissinger Major Shepard's words. Colonel Grissinger directed me to accompany him to see the Commandant of the post, General Symmonds. The matter of a post mortem examination was discussed. There was an autopsy, a partial autopsy. It was

held in the mortuary of Durland-Sawtell. I was ordered by my commanding officer to perform an autopsy at eight o'clock that evening. Major Hedrick, Judge Advocate at the post was called to the General's Quarters. After these conversations my Post Surgeon called me on the telephone about seven o'clock and directed me to perform an autopsy.

Q. Did you ever request an autopsy of anyone?

A. I did not—not of my own. I carried a request from my—

Q. Did you ever request the Commanding Surgeon to ask for an autopsy?

A. I did not.

Q. What was your part in this matter?

A. I told Colonel Grissinger that Mrs. Shepard had died. I left Major Shepard's quarters and went immediately to Colonel Grissinger's quarters. I reported to him as Chief of the Medical Service that I would not sign a death certificate but as Chief of the Medical Service I had no objection to anybody else signing a death certificate.

After I got my order I performed a partial autopsy. Captain, now Major DuFrenne, Sergeant Gresser, and a representative of the undertaker, the embalmer I think he
103 was, was present when the autopsy was had.

Q. At the time of the autopsy just state what was said there by the undertaker to you as to the extent of the autopsy.

Mr. Kagey: Just a moment. If the court please, this man performed the autopsy, not the undertaker. We object to any conversation that the undertaker may have had with him or that he may have had with the undertaker about the extent of the autopsy or the manner in which it was to be conducted if any.

The Court: What statement did you make about the autopsy? What was said?

Mr. Brewster: The court must remember in this testimony that the defendant has made his statement and stated that his wife did not want any autopsy at all.

(Discussion by counsel with the court.)

The Court: You may answer the question.

Mr. Kagey: Note an exception, please.

A. The undertaker told me, "If you remove the heart or damage any large vessels without tying off those vessels very

carefully" that he could not prepare the body in any way, that it would be kept decently, until it was shipped to California.

In an autopsy where you are seeking the cause of death it is not necessary in all cases to make what is called a complete autopsy, taking out all the parts. If a man died of hemorrhage of the bowels it would not be necessary to remove the brain. Had he been shot in the intestines by somebody and died it would not be necessary to arrive at the cause of death to remove the bowels. We opened Mrs. Shepard's abdomen from the lower part of the rib to the pelvic bone. We examined all of the viscera in place. We then removed, tying off carefully all blood vessels so as not to interfere with the embalming, the entire intestinal tract from the stomach to the rectum. We removed one kidney, the pancreas, the spleen, and pieces of the liver. We examined these grossly as we removed them opening the intestinal tract, splitting it in its entire length, observing it at that time and washing it under the tap. We examined the mucous surfaces after we had made as careful a gross examination as we were capable of. We placed the viscera immediately in 20 per cent formula in glass containers to preserve it. The gross pathology of the stomach was, the full mucous membrane of the stomach showed evidence of inflammation with a mucous, sticky exudate all over the lining of the stomach. Grossly there were two ulcers in the stomach, the lower one being about two inches above the pyloric end of the stomach. The pyloric end
104 of the stomach is a band of muscle which acts as a valve and is usually accepted as the lower portion of the stomach where the stomach joins the small intestines. This ulcer was about an inch and a quarter. It was elliptical in shape, about an inch and a quarter long by three quarters of an inch wide. It had not occurred within a week in my opinion of her death. It showed some evidence of attempted healing, some granulation up from the bottom, as ulcers heal, but it was not healed. Above this was a smaller ulcer, a little smaller, or about the size, or a little smaller, it is very hard with contractions of the stomach after death to estimate the size of this, but to the best of my memory it was about the size of a quarter of a dollar, very new, ragged, the edges punched out down to the muscle of the stomach and charred and blackened by a caustic at the base with no attempted healing and in my opinion of very recent origin. In the little

guts there was an inflammation, the blood vessels were engorged and very little gross evidence of pathology of inflammation in the little gut. We found the big gut riddled especially around the figmoid flexure with ulcers. These ulcers for the most part were small, possibly half an inch or less by a quarter of an inch covered with a membrane which in medicine is known as diphthoid which easily pulls with forceps and even after death bleeds when you attempt to strip these membranes from the ulcers. The mucous membrane was darkened and evidence of hemorrhage in the mucous membrane and blood in the mucous membrane and the mucous lining itself. We examined the appendics to see whether there was any evidence of appendicitis and there was no evidence of disease in the appendics. We examined the other organs. By gross pathology I mean what you can see with the naked eye. We examined the kidney and it was my opinion that the kidney on cut section showed evidence of mild swelling comparatively mild and inflammatory process. I thought the same way about the liver, although I will say that was not very pronounced. The spleen was soft and not enlarged. We found no evidence of pathology in the pancreas. After this examination and after I put it in the formaldehyde I delivered the viscera to Sergeant Gresser in the
105 mortuary and instructed him to lock it in a cabinet that night in the laboratory until I called for it the next morning. I did not leave this viscera on the table as stated by counsel for defendant in his opening statement. The next day I took the viscera by order of the Commandant in my personal possession to the 7th Corp Area Headquarters at Omaha and there I delivered it to Major Hugh Mahon who was in charge of the Laboratory at that time. It was my opinion at the time of the autopsy that the condition of the viscera was characteristic of mercurial poisoning but I awaited the report of the toxicologist before I arrived at a conclusive opinion. In my opinion the autopsy disclosed the cause of death. The cause of death disclosed by the autopsy was a metallic poisoning and taking the pathology, leaving out the question of what caused her death, the death was caused by the lesions that we found in the autopsy. That is, in the big bowels and in the stomach and in the kidneys. The ulcers we found in the large bowels caused the hemorrhages we found. There are many types of stomach ulcers.

Frequently they have no influence on the ability to retain food. Sometimes the ulcers themselves so far as I know would have no direct influence on that. The general inflammatory condition of her stomach would make it highly improbable that she would be able to retain much or any food in her stomach. During Mrs. Shepard's illness I had a conversation with Major Shepard in which in substance he said her condition was due to the amount of liquor Mrs. Shepard had been drinking. Mrs. Shepard denied that and said, "I have not drunk enough liquor to ever make me as sick as this." Major Shepard was usually there when I went to see Mrs. Shepard. Frequently he went in the room and remained during the visit. He was quite calm.

Q. Do you know whether he prescribed for his wife?

A. I do not know—I do know that he told me on several occasions what he was giving his wife.

Q. Did you consider yourself a physician in charge of this case?

A. I did not.

Mr. Kagey: Just a moment, if the court please. 106 This calls for the opinion and conclusion of the witness.

He can testify what he did and it is a question for the jury to determine whether he was in charge or not.

The Court: It may stand.

Mr. Kagey: Exception.

A. I did not.

Q. (By Mr. Brewster) Were you the physician in charge?

A. I was not.

Q State whether or not you met any opposition from Major Shepard in the conduct of this case.

Mr. Kagey: We object to that as calling for an opinion and conclusion of the witness.

Q. (By Mr. Brewster) Tell what it was.

The Court: You may state what it was.

Mr. Kagey: Note an exception.

A. The sort of opposition, I do not know. I met with a great deal of opposition and as far as the kind particularly, it was with regard to getting Mrs. Shepard into the hospital.

Mrs. Shepard's temperature was always less than a degree above normal. This means that the disease from which she was suffering was not a type of disease which causes a fever re-action, the general class of which in general are due to bacterial infection. If Mrs. Shepard had had intestinal ulcers

that would not, per se in itself, have produced an increase in the number of white blood corpuscles. If the ulcers were caused by some metallic poisoning and sufficient necrossing areas, then there would be an increase in white corpuscles. Any great destruction of tissue in the intestines regardless of what caused it would probably result in an increased white blood count. The change of the white cells of the blood or an increase of them would not necessarily mean a bacterial condition. It means a re-action of the body against the absorption of a type of substance against which it defends itself by an increase in white blood cells. At times she had diarrhea. There was cessation of the diarrhea. I never did give her any calomel. In that condition calomel would not have been a proper treatment. I am of the opinion now from the treatment of the disease and what I saw at
107 the autopsy that she had no primary bacterial infection; that bacterial infection was not the cause of her illness. Her mouth condition was rather well marked before any mouth wash was used and she had symptoms of intestinal disturbances before the mouth got sore. To my personal knowledge thirty-six or forty-eight hours before there was any appearance in the mouth. The intestinal disturbances noted before the mouth condition appeared were diarrhea and some vomiting, a gastro intestinal condition. I do not know of any poisoning but mercury that strikes the stomach, hits the big gut and misses the little gut. The stools were never examined in gross by me because they were never saved for me to be examined. There was a nurse there all the time. Mrs. Shepard died in the bedroom of her quarters where she had been ill on the government reservation, exclusively under the jurisdiction of the United States Government, on June 15, 1929, within ten minutes one way or the other of five o'clock in the afternoon.

Q. (By Mr. Brewster) Would a bacterial dysentery have produced an elevation in the number of white blood corpuscles as developed in this case.

A. There is in dysentery, in bacterial dysentery bascillary dysentery, an elevation in the white blood corpuscles, but the elevation is not progressive in the way that this one was and it is associated with high fever.

Q. And there was no high fever?

A. There was never any fever as such.

With reference to this miocarditis I examined her heart and took her blood pressure. A day or two after she was taken so suddenly ill she had 160 cystolic, that is the pressure at the height of the heart's contraction, the highest pressure and reached to 110 while the heart was relaxed and while the pressure is maintained entirely by the contraction of the arteries. From that high point it rather rapidly declined to around a normal blood pressure of around 120 to over 80 or 90 and remained there so far as I know until the intestinal hemorrhages started. I did not take it after it apparently struck level. She did not suffer from any pains in the
108 arms or legs. She did not have peripheral neuritis.

A centimeter is one one hundredths of 39 inches. A centimeter is roughly four tenths of an inch. A millimeter is one tenth of a centimeter so it is about one fortieth of an inch so a cubic millimeter is a cubic area which is one fortieth of an inch in each dimension. I have said how many white corpuscles there are in a millimeter of blood. The red corpuscles far exceed the white corpuscles. The blood count was around five million which is normal until her intestinal hemorrhages when it dropped very rapidly. After that time there was some increase in the red blood cells as the hemorrhage was recovered from but they never again reached normal. To the best of my memory before the intestinal hemorrhages her hemoglobin was about 85 or 90. After that I do not know. I heard Major Dye's testimony of the mouth and eye condition. The mouth condition is a symptom of mercurial poisoning and the eye condition is not incompatible with mercurial poisoning.

Q. How does mercury hit the mouth?

A. Mercury hits the mouth twice. If taken in sufficient concentration, not sufficiently diluted, it will burn the mouth on the way down, but if sufficiently diluted it will not affect the mouth on the way down, if it is sufficiently weak. However, after it is absorbed into the body and gets into the blood stream, mercury is again excreted by the salivary glands into the mouth and gets there by the blood stream and produces rather a characteristic inflammation in the mouth, but that is sometime after it is taken.

Q. Is that apparently what happened here?

A. Mrs. Shepard had an inflammation of the mouth which was due to mercury which she had taken internally.

At the time she was first taken badly sick on the 20th there was no mouth infection. It was thirty-six to forty-eight hours afterwards the mouth infection occurred. She complained of pains in the region of the stomach and bowels before the hemorrhage. That complaint was a little later than the mouth condition but she had had a stomach disturbance prior to that, the stomach symptoms were prior to the mouth trouble.

Cross Examination.

Major Shepard called me to see Mrs. Shepard the morning of May 21st and told me Major Strickler had been
109 called the night before. Major Strickler is a psychiatrist, that is one who specializes in mental diseases and he is also a regular physician. I do not know what a psychiatrist would do. Major DuFrenne and I discussed Mrs. Shepard's condition with Major Shepard and we decided to give her a blood transfusion on account of her terribly grave condition. I made many suggestions in the case, other people did too, and they were acted upon by Major Shepard. I assisted in the blood transfusion.

Q. Now, you made a statement a while ago that you went to one of the officers and asked to be relieved. If you were not in charge of the case why did you want to be relieved?

A. I asked to be relieved of all connection with the case because as chief of the medical service I was in a position where blame could easily be attached to medical work poorly done at the post. As a matter of fact, the attending surgeon's office, which dealt with our patients, not in the hospital, was under the chief of medical service and as chief of the medical service, I was at least technically responsible for the character of the medical work done on that post, as distinguished from the surgical work and eye, ear and nose and throat work.

I did not tell Major Shepard I was going to quit the case and not be responsible for it and I continued to attend Mrs. Shepard up until the time of her death. I obtained my knowledge of the blood count officially reported to me on blanks for that purpose from the laboratory. I suspected poison in the case. I am familiar with the standard text on autopsy and I know there are standard texts used by professional pathologists. I am not a professionel pathologist. Mrs. Shepard's mouth condition began approximately thirty-

six hours after the commencement of her illness. I saw her mouth the first time I saw her. I looked in her throat as a matter of general going over. The condition of Mrs. Shepard's eyes was not incompatible with mercurial poisoning.

Q. Will you tell the jury what you mean by that statement?

A. I mean that the condition in her eyes as testified to by Major Dye, retinitis, an engorgement of the blood vessels in the eye, might be caused by any poisonous substance, whether bacterial or not, and it was perfectly possible in mercurial poisoning, although it was not a constant sign of mercurial poisoning.

There is authority in standard textbooks that says that such conditions occur in mercurial poisoning. I can find that text and refer you to it. I do not recall whether DuFrenne
110 or myself suggested the blood transfusion. I think DuFrenne had seen Mrs. Shepard before that time. I know he had seen her at least once. I do not know how many or when any physicians saw Mrs. Shepard. I said Mrs. Shepard died of mercurial poisoning. The same
111 condition that produced the ulcers in the bowels caused her death. There was no secondary infection resulting from these ulcers and I am positive there were no symptoms or evidence of infection. A differential count of 80,000 white cells would not mean mercurial poisoning but as symptoms with mercurial poisoning.

A. An increase of white blood cells is a characteristic occurrence in mercurial poisoning, particularly those who live some time. The cause of it, in my opinion, is largely the absorption of necrotic tissue from the poison. That is, tissue destroyed and burned by the poison.

Q. How many cases of mercurial poisoning have you professionally treated?

A. Well, two, I think.

I do not know at this time with the exception of two cases any record of any case of mercurial poisoning where the blood count reached 80,000. I can get competent authority in which symptoms of this sort was found where the white corpuscles reached 80,000 in cases of mercurial poisoning. The severe hemorrhages did not last over a day or two, the last severe ones did not last over a few hours and any great evidence of bleeding was gone for some time before Mrs. Shepard's death. I was not treating Mrs. Shepard and I never prescribed for her. I suggested forms of treatment. I suggested that her

pulse really was up and would seem to impress Major Shepard a good deal and I suggested if he wished to lower it he might do so with several doses of digitalis but I made no suggestion as to the condition of Mrs. Shepard because I did not know what was the matter with her. I did not make any suggestions relative to her eyes because Major Dye was looking after her and I do not remember that I made any suggestions about her mouth except to call a dentist and suggested that the devitalized teeth be removed.

Q. Did you prescribe sodium phosphate for her at any time?

A. I think I probably did—no, I take that back, I suggested that she be given sodium phosphate.

Q. Why did you do that?

A. Well, from the very first, without being able to
112 tell you why or how, it appeared to me that Mrs. Shepard had some evidence of liver damage the first time I saw her and some disturbance of the function of the liver. That was an impression that I cannot defend. In order to stimulate the activity of her liver I suggested she be given some sodium phosphate, which is an accepted treatment.

Q. Doctor, in your studies as a physician you learned what the prominent symptoms of mercuric poisoning were, did you not?

A. I suppose so.

Q. I will ask you, Doctor, if the symptoms of mercuric poisoning are not about the most pronounced of any kind of poisons that can be taken.

A. That is when mercury is given in one big dose. The only mercuric poison I have seen before was given in one big dose. I do not think I would fail to recognize such a condition. I have never seen mercuric poison, which is a slow poison, before.

Whether mercury is a slow poison depends entirely on how much is given at one time. I have never had an experience before in this type of case. I stated she died of mercuric poisoning. It would certainly be a fact in my judgment she got enough in time to kill her. I assisted Major DuFrenne to make the blood transfusion on the afternoon of the day she died. It is my opinion the transfusion was completed before two o'clock. After the transfusion we waited around for half an hour to see if she was going to have any reaction and after that we left and I went out to play golf. I was

there until probably 4:30 when I was called from the golf links. I went directly from the golf links to Major Shepard's quarters. I found Major Shepard and the nurse, Mrs. Shepard, Mrs. Shepard's brother and his wife, and Captain Johnson of the Medical Corps. At the time the transfusion was started Mrs. Shepard was moribund, was practically dying, a systolic pressure of 60, a dystolic pressure of 70. She was stuporous, practically unconscious. After we got the blood into her her pulse rose to 90 and over 65. She said, "I feel very much better, I feel like I could sleep now, I want to go to sleep." When I was called from the golf course I got back there probably ten minutes before she died. She was unconscious. I stated her heart beat a while after she died. Stopping of the heart beat is not death itself. People are sometimes alive after their heart stops beating. The only sure sign of death is disintegration and it would be
113 hard to say when death took place. The undertaker asked me not to remove the heart or lungs because of embalming Mrs. Shepard. The brain was not specifically mentioned. I am not an undertaker and do not know that a body can be better embalmed if the organs are removed.

Q. Do you remember whether anyone else was called by anybody while this case was being treated?

A. Yes, I finally brought Dr. Fred O'Donnell out from Junction City.

Q. You were taking a great deal of interest in the case?

A. I was.

Q. —Although you did not consider you were treating her?

A. That is true.

Q. Are you sure you did not prescribe whiskey?

A. I suggested to Major Shepard she could not retain anything on her stomach and that she could probably keep an eggnog. I may have even signed the prescription, they all have to be signed by a medical officer. I probably did.

I do not know of any ulcers per se that would cause 80,000 white blood cells. You get all sorts of freakish disturbances in the white blood count just before death. It is a bad sign when the white blood cells begin to rise out of all reason. Her white blood count commenced to go up from the first. The first time reported to me it was 16 or 18,000, about two or three times what it ought to be. The next time 25 or 30,000, then 60,000, I believe. It was possibly a week after the first count until it went up to 30,000 and I cannot re-

member how long it was until it went to 60,000, probably another week. And the third week it went to 80,000 which was within three days of her death to the best of my memory. I had orders from my commanding officer to make an autopsy.

Q. Were those orders that you make an autopsy or that you make a partial autopsy?

A. Those orders left it to my discretion as to how much autopsy should be done.

It was not alone the undertaker's suggestion that kept me from making a complete autopsy.

Q. Is it customary for the doctor who makes an
114 autopsy in anything as serious as poison cases, to consult the undertaker about how the autopsy should be made?

A. It is not, but professional pathologists usually make those autopsies. Furthermore, the case is already in the hands of the properly constituted authorities, and it is made for that purpose. I made this autopsy with no attempt to prove that Mrs. Shepard had died with poison and with no motive, I had no preconceived idea of proving anything, and I never found what I considered to be sufficient to cause death and, rather than to mutilate that body, I stopped.

Q. Did it occur to you—you say you stopped when you thought you had gone far enough?

A. I stopped when I went far enough.

Q. You did not find any poison at that time?

A. No, but I found all the evidence of poison.

Q. You did not look at the heart to see whether there was any evidence of poison in the heart?

A. If she died of miocarditis or of mercury, she died of what we found.

Q. You are sure of that. Did it occur to you that in something as important as that, that the autopsy should be performed in the manner prescribed by the recognized authorities?

A. That occurred to me, Mr. Kagey, but when we started that autopsy we were none too sure of our ground. Major Shepard had objected strenuously to this autopsy, the undertaker said we would ruin that body.

If you want me to answer your question I will answer it completely. With all the statements that were made that her body was not to be touched, I thought at the time and said

to Major DuFrenne, "We have enough for presumptive tests, and if there is anything more the body may be exhumed." It never occurred to me that that would not be possible. I have never heard of the book "Legal Medicine and Toxicology" by Peterson, Haines and Webster, Second Edition, 1922, and I gave no opinion about toxicology. Toxicology is the study of poisons and I made no test to discover poison. My opinion that this woman was poisoned was based on that of a general medical man without the reports of pathologists and toxicologists. When autopsies are done by professional pathologists it is probably customary to have scales to weigh the organs. This was not an autopsy to collect a lot of information. This was an autopsy to ascertain the cause of death and was not conducted in a way that a professional pathologist who is interested in his autopsies conducts an
115 autopsy. A pathologist conducts an autopsy for the purpose of finding out a great deal more than what causes death. I am not a neuropsychiatrist and did not make a complete neurological examination in this case. Any physician can detect peritheral neuritis and she had no peritheral neuritis. The symptoms of peritheral neuritis are first pain and sickness, loss of motion, loss of function in the extremities. Most of the common type persist in either wrist drop or an ankle drop or foot drop and I did not think a neurological examination was necessary to determine that she did not have peritheral neuritis. I did not examine Mrs. Shepard's eye grounds.

Q. I believe you stated before luncheon that Mrs. Shepard died of mercury, bichloride of mercury, or mercury?

A. I said she died of mercurial poisoning. I did not specify which salt.

Q. Do you think she died of hemorrhage of the bowels?

A. I think she died of mercurial poisoning. If you want me to say what she died from eventually, she died of exhaustion due to mercurial poisoning.

The symptoms of mercurial poisoning vary depending on the amount of mercury given at one time. The classical symptoms of mercury poisoning are rather a digestive disturbance, violent reaction in the stomach, a vomiting, a severe vomiting, collapse, diarrhea, and if the patient does not die in collapse he dies of shock. One of the clinical symptoms is sore mouth and if in sufficient quantities to damage the kid-

neys you would get all the symptoms of acute Bright's disease. If not given in sufficient quantities you may not get the symptoms of acute Bright's disease. The patient, however, first collapses in shock and if he survives that he usually improves to a certain level and may remain there stationary for some days when the secondary effects of mercury become apparent in acute, rather violent inflammation in the bowels with or without hemorrhage and some evidence of kidney damage and death. Exhaustion might have been the immediate cause of death. Other ways a patient could die from mercurial poisoning are acute urinemia, acute suppression of the urine, they die of shock if in sufficient quantities some-
.116 time after and in some cases burn a hole through the stomach die of shock, they die within an hour of the time they took it. This occurs in case of a concentrated dose. After the hemorrhages and before the blood transfusion the red cell count rose after the first great disturbance following the hemorrhages but never reached normal. I did not see Mrs. Shepard have a chill after the blood transfusion and I stayed a half or three quarters of an hour afterwards. The red cell count went from 5,000,000 to two million and then back to three million. One of the ulcers in her stomach looked like it had been there some days. There was evidence of healing, there was some evidence of repair. I am not a competent pathologist to give a judgment how long it had been there. The one ulcer had been there at least a week. I did not discover any evidence of mercury in the liver. I did not discover mercury per se in the kidneys. I discovered evidence of inflammatory reaction in the kidneys which could be caused by several things among them mercury but I could not say that it was a mercurial kidney. I did not discover mercury or albumin in the urine. At times she had traces of albumin, sometimes the reports showed albumin positive. The discovery of mercury in the urine depends upon the rapidity of excretion of mercury. I performed the autopsy on Mrs. Shepard about eight o'clock in the evening and was assisted by Major DuFrenne and Sergeant Gresser. I have no idea how many grams of liver I took. It was a piece large enough for any type of microscopic examination and for a chemical examination. I am not a competent pathologist but I knew how much of the liver was necessary to make those examinations. I did not weigh it. I have performed

and attempted to perform an autopsy before. Both. And have performed autopsies like I performed this one. Witchaus on Toxicology is a recognized authority on toxicology.

Q. Is it not laid down as a rule in the literature of the profession that it is not sufficient to discover the distance of a fatal lesion or lesions, because all of the possible fatal lesions of organs of the body must be shown by actual examination to be absent before any existing lesion can be regarded as the whole cause of death?

A. That may be a rule in medicolegal cases, but you must remember I was not making this autopsy for medicolegal purposes. 117

I will answer your question as to post mortem examination if you will read the next paragraph.

A. Here it is. You asked me about the next paragraph. The next paragraph is, "Leaving out of consideration the moral evidence which does not concern the expert, the proof of poisoning is complete when the symptom is known to be caused by the poison, have been observed during life, when the post mortem examination shows the presence of such lesions as it is capable of producing and the absence of other causes of death and when the toxic agent is demonstrated to be present in the cadaver, or in the vomit or dejecta of the person poisoned."

A professional pathologist would weigh each particle taken from the cadaver, but I know of no ordinary rules for anybody who is not a professional pathologist for making an autopsy. I think he makes his own rules as he goes along. I did not have a professional pathologist because I did not have anybody that was one. I probably could have gotten one with a lot of delay. I did not have a text book that would tell how to make an autopsy. I probably could have found one at the Post Library. I wrote up the record of the autopsy in my quarters after it had been made and I did not know that it was necessary to write the record up at the time. The record described completely and accurately all of that actually observed. The record is apparently a part of the records in the case.

Q. Did you know, Doctor, whether or not that an examination in an autopsy, if properly made under the rules of your profession, should record each step?

A. No—now, just a minute. Now, who makes those rules?

Q. I am asking you.

A. You say "under the rules of my profession." I do not know what those rules are.

Q. In the standard textbooks?

A. There are lots of things written in texts that no great physician believes.

Q. Conclusions reached by the Mayos and other reputable clinics?

A. I imagine their system of autopsy is satisfactory to them. I see no reason why I should follow them.

Q. You see no reason why you should follow them?

Mr. Brewster: We object to that and submit the
118 mechanical manner of conducting an autopsy is not a matter of importance and could not throw any light on the subject. It does not make any difference whether I went out there and cut them out or whether it was done by opening with a peculiar kind of knife or a certain kind of scissors. Certainly if he used other scissors, that would not affect the value of the evidence of his autopsy.

The Court: I think this has gone a good ways, but I will see what the next question is.

Q. Doctor, the way this autopsy is performed, the way the viscera is handled, that is, kept free from infection or kept free from dirt, or anything of that sort, might have a great deal to do with the accuracy of the work, might it?

A. I can't conceive of certain types of examination to be made afterwards, where it would be very much better to follow certain procedure.

Q. Yes?

A. In general, I should say no.

Q. You testified you left this viscera there on the table?

A. I did not testify anything of the kind.

Q. —and that Sergeant Gresser was directed—

A. I said I turned it over to Sergeant Gresser.

The viscera was in the Mortuary when I turned it over to Sergeant Gresser. It was placed in a glass jar in 20 per cent formula. I did not see what he did with it. I took the viscera to Omaha the next day by automobile accompanied by my family. I obtained the viscera from the Laboratory from whoever was there. I arrived in Omaha about five o'clock in the afternoon. Between May 21, 1929, and June 15, 1929, it did occur to me that Mrs. Shepard had metallic poisoning and I asked for a twenty-four hour specimen of urine to

send to the Corps Area Laboratory in Omaha to be examined for arsenic and other heavy metals. Upon the advice of the Post Surgeon I made no effort to determine whether or not she had been poisoned with mercury prior to her death. I was Chief of Medical Service and was under Colonel Grissinger who was Post Surgeon. We took out one whole kidney and about half of the other and there were no pronounced gross effects of kidney damage. I did not weigh the kidney I removed. Nothing was weighed.

Q. Just describe their appearance, will you, if you

119 can? . . . . .

A. They were normal in color. They were reddish to pinkish in hue, the capsules stipped easily on cut sections, and scraping with a knife, there seemed to me there was too much fluid, a little sheen which to me, while I tell you frankly I am not a competent pathologist, a mild swelling, a mild inflammatory reaction in the kidney.

Q. Did you remove the spleen?

A. I did.

Q. You did not weigh it either?

A. No.

Q. Did you open it and examine it?

A. I do not remember that I did. The spleen was small, rather normal in size, it may have been slightly smaller than normal, if you ask me to tell you the normal size of the spleen. However, most spleens are rather firm when they are removed. This spleen seemed to me a little bit soft at the time, although I cannot tell you definitely about that.

Q. As a matter of fact, you do not remember a great deal about how the spleen appeared?

A. As a matter of fact, I do.

Q. Tell us about it.

A. The spleen seemed to be a little softer than normal. It was dark in appearance.

Q. You did not open it?

A. Not that I remember.

I removed all of the stomach tying off the upper end of the stomach and the lower end of the esophagus and with the scissors taking the whole intestinal tract out as I went downward, I did save the contents of the stomach, small bowel or large bowel.

Q. Did you open the bowels?

A. I did.

Q. Describe their appearance.

A. There was nothing in the inside of the small bowel that was very characteristic. Externally through the peritoneum you could see deeply engorged blood vessels, but there was no particular swelling or any evidence of pronounced inflammation in the small bowel. The large bowel, however, was dark in appearance, which I interpreted to be end products of breakdown, below the surface, it was covered with ulcers, particularly around the sigmoid flexure; that was covered with a pseudo membrane, which when stripped left bleeding points after the bowel had been removed.

I removed the pancreas but did not open it. I exam-
120 ined the bladder but left it in place. It contained urine but was not distended. I examined the womb and ovaries but left them in place.

Q. Describe their appearance.

A. Their appearance was quite normal, the uterus was small as is characteristic in a person who has not borne a child, the tubes showed no evidence of inflammation, the fallopian tubes, and they were quite soft and no evidence of acute or chronic inflammation. The ovaries were normal in size and also without any evidence of acute or chronic inflammation.

I do not know where the record of my autopsy finding is.

Mr. Brewster: We have a photostatic copy of it. It is part of the Post record.

Mr. Kagey: I should like to have it for the purpose of this cross examination.

Q. While you are looking for that I will ask you another question here about the urine.

Q. . . . . You could have taken some urine from the bladder could you not?

A. Oh, yes.

Q. Why did you not do it?

A. When?

Q. At the time of the post mortem examination.

A. The post mortem examination? It did not seem to me to be necessary to do it.

Q. Did you not know, Doctor, if it was a case of mercurial poisoning that the contents of the bladder might be very important?

A. No, I did not know that; I do not know it now.

Q. You do not know that now, either?

A. No. One might have mercury any place in the body. One may find it in long bones, but one does not usually take out the long bones; one may find it elsewhere in sufficient quantities; it was not essential to take any urine.

Q. It was not essential?

A. Not essential.

Q. Do I understand that you were not making an autopsy or examination for medicolegal purposes?

A. That is true, I was not making it for that purpose.

Q. Why were you making it?

121 A. I was making it to determine the cause of death of Mrs. Shepard.

Q. Were you making it because you were suspicious that she had been poisoned?

A. I made it because I—no, I made it because I was directed to make it by the post surgeon.

Q. That is the reason you made, is it?

A. That is the reason I made it, it is.

I was ordered to do the autopsy. I know that there was no competent pathologist at the Post. I was not surprised when Colonel Grissinger ordered a post mortem examination as I had discussed with him about the case. I notified no one other than the commanding officer of her death. I talked with Major DuFrenne about the signature on the death certificate after the autopsy and said in my opinion the death certificate should be rather flexible awaiting further examination of the viscera and it should be the truth. But something put down so that it would not commit any of us to a fixed diagnosis. Something which in other words would say something but not be conclusive.

(Defendant's Exhibit C, the Death Certificate, identified and admitted in evidence.) The pertinent part of the death certificate is as follows: "Place of death, County, Geary, Township, U. S. Gov't. Reservation Fort Riley, Kansas. Full name, Zenana Shepard, residence Fort Riley, Kansas. Sex, female, color white, married. Wife of C. A. Shepard, Maj. M. C. Age 37. Date of death—June 15, 1929. I hereby certify that I attended deceased from June 15, 1929 to June 15, 1929, that I last saw her alive on June 15, 1929, and that death occurred on the date stated above at 4:10 P. M. Cause of death: gastroenteritis, acute, severe. Cause undetermined.

Did an operation procede death? No. Was there an autopsy? Yes. M. F. DuFrenne, Capt., M. C., June 17, 192..., Ft. Riley, Kans."

I suspected Mrs. Shepard was suffering from poisoning before her death, took no steps to ascertain the kind of poisoning other than what I have related here. I do not know whether the bowel movements, urine, blood or saliva were examined for mercury or not.

122 Q. Do you think you could recognize an ordinary case of poisoning by arsenic or mercury of your own knowledge and without aid of the medical books of which you had use?

A. I could never be absolutely definite, I could have an opinion about it, which I would wish to confirm by laboratory examinations before I reached a conclusive opinion.

Q. I do not know whether I asked you before or not, but if I did not I shall ask you again, because I want an answer to this: Do you know how many times or about how many times you saw Mrs. Shepard after May 15th, and before her death, approximately?

A. Thirty or thirty-five times.

Q. Thirty or thirty-five times?

A. Yes.

I examined Mrs. Shepard's mouth sufficiently to determine she had no Vincent's infection. After that time I looked in her mouth several times and saw nothing which to me was evidence of Vincent's infection. I did not make a microscopic examination, but I saw the slide which was said to have been made in the case and looked for probably five minutes at that one slide. I think Sergeant Gresser made the slides. At the time I first called to see her her bowels were not normal, she had all the phases of constipation and diarrhea and I cannot remember at the time I first saw her which particular phase she was in. I suggested sodium phosphate. It is not a purgative alone. It is also a cholagogue, something which stimulates the liver. I first prescribed that within a day or two of May 21st. I did not notice any signs of kidney trouble. Later in the disease I noticed signs of kidney trouble on the urine examination. She had some albumin in her urine off and on. I do not know the number of times the urine was examined. I would not know whether I prescribed any particular medicine for the condition of her kidneys or urine. That was dependent upon the basic condition; it certainly

was not a primary nephritis; the kidneys were not primarily the cause of her trouble. It would have been possible to make a diagnosis for mercurial poisoning with the patient in the hospital, with absolute control over that patient the diagnosis would have been made before her death. She was not in the hospital under my control. I knew about Mrs. Shepard using bichloride of mercury in a mouth wash later on in the disease. I do not remember if it was just one week to the day from the time I was called into the case.

Q. I believe you stated she had some pains in the
123 stomach?

A. Yes.

Q. Did you not state that?

A. I did.

Q. When was that with reference to the time she took sick?

A. It was very early in her disease. I cannot remember the exact time when that was, but it was comparatively early.

Q. Was it a constant pain?

A. No, it seemed rather constant during twenty-four or thirty-six hours, but it was not particularly violent; at least, I gathered the impression from her that it was not particularly violent.

Q. Is not severe pain in the stomach a very frequent symptom of mercurial poisoning?

A. It is a frequent symptom, yes. It is not a conclusive symptom.

Q. If she had pain in her stomach could not that pain have been due to a chronic stomach ulcer?

A. No, her pain was not in that place, it was lower down in the bowel.

The pain in her stomach could not be due to a chronic stomach ulcer because her pain was not in that place. It was lower down in the bowels. In my treatment of her so far as I know there was no suppression of urine. I believe there were occasional red blood cells reported on microscopic examination of the urine. There probably would be pus cells found in the urine of female patients in catharized specimens. There were highland casts found which are not necessarily detached pieces of lining of the tubes although they might be. Grossly the kidneys did not appear to be very much effected. When I came to see her the morning after I think Major Shepard told me about her mental condition the night before. When I called to see her she had slight confusion and loss of

memory. She did not show any particular cerebral excitability like "picking things out of the air". Major Strickler may have told me of her symptoms althought I have no recollection. Symptoms like she had I think could be caused by alcohol.

Q. What is the normal and modern treatment of bichloride of mercury poisoning, that is, the proper treatment?

A. If you get to them fast enough you pump their stomach and pump it in a hurry and put albumens in there that will combine to form albuminates of mercury which will relieve the condition. You pump their stomach if you can get it out fast enough, then nothing happens. Further than that my experience in treatment is that there is a sodium sulphate treatment which I believe has been generally found to be effective in the severe mercurial poisoning cases, in the acute poisons, and sub-acute. Other than that, your treatment is symptomatic and is directed at the symptoms the patient complains of. If they have suppression of urine, you treat them for uremia, you sweat them, you pack them, if it be gastro intestinal, whatever it may be, you treat them symptomatically.

Q. She had no uremic symptoms?

A. No, she had no uremic symptoms.

Q. Then you would not have any uremic treatment?

A. No.

Q. Doctor, isn't it a matter of fact that in cases of
124 mercurial poisoning, the standard treatment nowadays is to give sodium carbonate and common salt in distilled water?

A. That has not been universally accepted; that sounds like somebody's idea.

If I had known in time that she had bichloride of mercury poisoning I could have saved her life, but at no time after I saw her the first time could I have done anything, she had the mercury in and had had it for hours. When you save their lives you get to them in ten minutes. She had a mercurial salivation of the mouth. I do not know whether there was any loosening of the teeth because the dentist took charge of the mouth. I examined her heart and noticed no symptoms of any heart damages, she had no cardiac disturbance of any kind. I examined her lungs but gave her no X-ray as I did not have her at the hospital. We could not have taken the X-ray to her home. I did not tell Major Shepard or Major Rose or anyone else that Mrs. Shepard's death was a cardiac

death. She had no urimic symptoms that I observed. The Post Surgeon placed the attending Surgeon under the Chief of the Medical Service, and Major Shepard as attending physician became one of my assistants. There was no friction between me and Major Shepard. I never did visit any family he was treating or give any different order as to the conduct of cases he was handling, unless I took charge of them personally and assumed the responsibility.

Q. During the measles epidemic did you remove the quarantine signs from the home of one of the officers that had been placed there by Major Shepard, without saying anything to Major Shepard about it, or without telling him anything about it?

A. What is the name of that officer?

Q. I am just asking you, do you remember?

A. Yes, I remember a case. Shall I go on and relate the circumstances.

Q. You did do it?

A. I did not do it without Major Shepard's knowledge.

Q. Without his knowledge?

A. This case of measles in the family which was convalescent, with slight evidence of rash, Major Shepard, quite properly, had declined to remove the quarantine. This lady was, I think, coupled with another lady, to give a dinner party that night and had been expecting that the child would be out of quarantine at that time. She made a ter-
125 rible howl about it, she went to the Post Commander who would have nothing to do with it and directed her to the Post Surgeon. The Post Surgeon called Major Shepard in and talked to him and then called me as chief of the medical service, and being responsible person, asked me to go over and take a look at the child and come back and tell him the condition of the child. I came back and told the Post Surgeon that all the respiratory symptoms, all evidence of bronchitis in the child had disappeared, that the child still had a rash, that the child's temperature was normal, and I made no recommendations one way or the other as to his handling of that case. He decided to remove the quarantine.

Q. You are acquainted with Captain Holycross, are you not?

A. Yes, very slightly.

Q. Do you remember when Captain Holycross was being treated by Major Shepard for rheumatism of the shoulder?

A. To the best of my knowledge and belief at this minute I never saw Captain Holycross professionally.

Q. You remember saying to Captain Holycross, "Do not fool with Major Shepard, come to me, I will fix you up."

A. That is a lie, I never said that to anybody.

Q. If Captain Holycross said you did—

A. Captain Holycross lies if he says I did.

Q. You did go to General Ireland in Washington and tell him about this matter and told General Ireland that you thought there was a reason for believing that Major Shepard had had something to do with this case, with the death of his wife?

A. I told General Ireland nothing of the kind, neither did I go to him and tell him. I paid a courtesy call to General Ireland on my way through Washington. He inquired of me, having gotten information from other sources, what I knew of the case. I said Mrs. Shepard had died under peculiar circumstances, that I had performed the autopsy and the viscera was in the hands of army autopists and further than that I knew nothing about the case.

I had some urine examined that Major Shepard gave me. Asking Major Mahon to look for arsenic in the specimen of urine sent him was my own idea and not Major Shepard's.

Redirect Examination.

To this date Major Shepard never asked me the result of the autopsy. Mr. Kagey asked me to produce a volume. I have it. Webster, 1930. In talking about the effect on eyes of mercury poisoning it said "Along with these disturbances of the motor areas, disturbances of sensations are not uncommon, while in some cases affections of the sight and hearing may occur." Mr. Kagey also asked me to produce a standard text book to show leukocytosis. It says: "Goldblatt calls attention to the early progressive leukocytosis, the white count showing a rapid drop to normal during the period of convalescence."

Q. You have been inquired of at great length about
126 the kind of autopsy that is always necessary. Let me ask you, suppose a woman is suspected of having died of peritonitis, caused by an abortion and you opened the interior and examined the womb and found the foetus had been removed and found a very pronounced peritonitis. Would you regard it necessary to take her bladder out?

Mr. Kagey: We object to this as not proper redirect examination, and leading and suggestive. It is an attempt also to cross examine his own witness.

The Court: You may answer. I think it is entirely proper under the examination of the defendant.

Mr. Kagey: Note an exception.

Q. Would you?

A. I would not consider further examination necessary.

Q. Would it enter your head to go in and take out the bladder?

A. Not necessarily—

Mr. Kagey: We object to this question for the same reason as the last one, it is leading and suggestive and is not proper redirect examination.

I did not know at the time of the autopsy that the body was to be cremated. After Major Shepard returned, I had a conversation with him about June 24th or June 25th. He came into my office with a yellow piece of paper which resembled a telegraph blank. He said: "I have been to a tremendous expense with the sickness and death of my wife and I am very much in need of money. I have here a telegram from"—someone whom he mentioned in Denver, whom I did not know —"telling me I can sell two city lots that I own out there for $900.00. Would you mind if I took the rest of my leave, five days leave, and go to Denver and sell those lots?"

I said "By all means go ahead."

Q. Now, in this case Major Shepard was a doctor, was he not?

A. He was.

Q. He was attending his wife?

A. He was.

Q. And you considered him, I believe you said, in charge?

A. Sir?

Q. You considered him, I believe you said, in charge of the patient?

A. I did.

Q. Did the fact that he was doctoring his wife and in charge of the case have its effect on you in your conduct of the case?

A. Very much.

Recross Examination.

Referring to "Legal Medicine and Toxicology by Web-
127 ster", page 459, "Along with the disturbances of the motor areas disturbances of sensation are not uncommon, while in some cases affection of sight and hearing may occur." Mrs. Shepard would get exactly what she had a blurred—a blurring of vision. That is the way I would construe this.

M. F. DuFrenne was called as a witness on behalf
128 of the government and having been duly sworn testified as follows:

I am a Major in the Medical Corps of the United States Army and specialize in surgery. During the early part of 1929 I was residing at Fort Crook. I came to Fort Riley on May 4, 1929, and while there became acquainted with Major Shepard and Mrs. Shepard. I met Mrs. Shepard once. About a week after Mrs. Shepard became ill Major Shepard came to me and asked me whether I would go over and see Mrs. Shepard, that he thought that she was having some trouble with that chronic appendics of hers. I told him he would have to get permission from Major Hawley which he did and we arranged to go over about 11:30 that morning. It was probably in the first week of her illness. Major Hawley, Major Shepard and myself met in front of the hospital and went over there together. We arranged to meet in front of the hospital. I arrived ahead of Major Hawley and I got in the car and Major Shepard started to tell me something about Mrs. Shepard. Major Shepard said that Mrs. Shepard was a chronic alcoholic and that she had been drinking very heavily. Major Hawley said "I do not agree with you and you are painting the case too black for DuFrenne." He went over to the quarters and I made an examination of Mrs. Shepard. I examined Mrs. Shepard for appendicitis but the pain was too generalized in the lower part of the abdomen to indicate any appendics trouble. I next visited Mrs. Shepard approximately a week afterwards. Major Shepard came to me one morning and asked me if I would not go over and see Mrs. Shepard and said "Try and cheer her up a little bit and assure her that she is getting along all right." I went over and Major Shepard went with me. When I went into the

room I shook hands with Mrs. Shepard. She appeared glad to see me and she said "You will get me well, won't you?" I assured her that I would do all that I could. She also mentioned about me being recommended to her by some friends. I do not know exactly whether I saw her again before the transfusion or not but I do know that I saw her the day that she died. I had seen her the day she was taken to the
129 hospital to have her teeth extracted. I did the blood transfusion. About ten or eleven o'clock in the morning before the transfusion Major Hawley came into my office. He was very much convinced that Mrs. Shepard was going to die and that we should do something. About a week before Mrs. Shepard died at about midnight I received a telephone call from Major Shepard and he said his wife had just had a hemorrhage from the bowel and he wanted to know what to do. I told him I would recommend giving a quarter of a grain of morphine and elevate the foot of the bed. I think he said he had given her the morphine. About four o'clock that morning he called me again and said his wife had had another hemorrhage and asked me to come right over. I went over to Major Shepard's quarters and found Major Hawley already there. We stayed there until about 6:30 in the morning. The probability of the transfusion was thought of by me at that time. I doubt whether we discussed it. On the day of the transfusion, the day she died, I saw her about one o'clock. Her physical condition was that of a woman or individual critically ill. After it was agreed to do a transfusion and it was determined definitely who was going to do it we agreed to have the donors there at 1:00 o'clock. I took the blood pressure at that time as we always do before transfusions. Her blood pressure was 70 over 50. That means that her blood pressure was extremely low and she has a pulse pressure of 50 which according to all teaching means unless you use other means or try some other means the blood pressure will not rise again and the patient will die. A transfusion was indicated especially in view of the fact that she had hemorrhages and low blood pressure. Following the transfusion Mrs. Shepard said she felt much better. I again took the blood pressure. It was 90 over 60 showing an increase of pulse pressure from 20 to 30. She said if she was left alone she thought that she could sleep. I stayed there about a half an hour. I next saw Mrs. Shepard at five o'clock that afternoon. She was dying. I was present in the room

when she died. That was at her quarters. Previous to the death of Mrs. Shepard I had a conversation with Major
130 Shepard relative to the performance of an autopsy. I think it was in the beginning of her illness, Major Shepard was very much concerned and he would come to my office and he was very much worried and I remember one day he was very much concerned about her condition and I do not know what prompted the remark or anything but he said "If anything did happen I certainly do not want an autopsy." I did not reply to that. I did not think at that time that she was critically ill. I was present when the autopsy was performed.

Q. Just go ahead and state what you did.

A. I think Major Hawley and I went down to Junction City about 8 o'clock in the evening, and we went over to the mortuary. When we arrived there Sergeant Gresser was there, and also a man whom I took to be the embalmer. Major Hawley made an incision in the midline about an inch below the end of the breastbone. This incision was carried all the day down to the pubic bone. The abdomen was opened, and I remember this very well, that I examined the appendix, to make sure that I had not missed an acute appendix. Grossly it was normal. I also examined the uterus at that time, trying to determine where the hemorrhage came from. The uterus and all appendages were apparently normal. After that, we took out the stomach and the intestines down as far as the rectum, including the rectum. We also took the left kidney, the upper pole, or one-half, of the right kidney, sections of the liver; I think we took the entire spleen, although I am not sure, the pancreas, and I believe that is all.

We made an examination of the viscera. We opened up the stomach as well as opening up the entire length of the intestines. We found some ulcers in the stomach. One about the size of a dollar and there were other smaller ulcers. The small intestines showed nothing except that it was discolored, the vessels being engorged. There were various ulcers in the large intestines which varied in size of a ten cent piece from there on down. These ulcers were covered with a sort of grayish, dirty membrane which could be removed by pulling off with forceps and looked like a membrane one would expect to find in diphtheria. The viscera was placed in glass jars and Sergeant Gresser instructed to lock them up and to deliver them to no one but Hawley. I next saw Major Shepard

the morning after he returned from Los Angeles and he stated that while in Los Angeles he had seen General Ireland and the General had asked him whether he desired a transfer or not. He asked me what I thought about a transfer
131 and he told me at that time that he desired to go to Texas, to San Antonio. He gave his reasons, stating that he felt, should he be assigned to San Antonio, whether it be Brooks Field or Kelly Field that he felt that should there be a vacancy for a Flight Surgeon he felt he could be available for that duty if he were on the ground floor at the time the assignments were made. I said "I know you are very anxious to get in the Air Corps, and I see no reason why you should not go down there and look over the situation." I believe he left that Monday. I know he stated General Ireland asked him if he wanted a transfer. I saw Major Shepard on the day of the funeral and had a conversation with him.

A. He asked me over to his quarters, I think, about 1 o'clock, and the funeral was to be about 2 o'clock, and he said he felt very badly, and he said he should like to have something to make him quiet, or buck him up, but, he said he would appreciate it very much if I would not prescribe whiskey for him, because he did not think it was proper to go to a funeral with liquor on his breath. I did not prescribe liquor; I think I prescribed a sedative, I think it was bromide. I do not recall our conversation, other than I did say something that, at that time, I did not know what the results of the post mortem were, and I think he also told me he was also leaving at 4 o'clock that afternoon.

I saw Major Shepard about August 1. He was eating at the same mess I was and he looked very ill and left the table early. I saw him the next day at the hospital and he told me he had had a hemorrhage. I advised him to go home and tell the Colonel about it, when he said, "Do you think I have the same thing my wife had?" I told him I did not believe so, but I did not know. I signed the death certificate and put down "Gastro-enteritis, acute, severe, cause undetermined." The word "gastro" pertains to the stomach. "Entero" pertains to the intestines. The "itis" means inflammation of the stomach and intestines.

Q. From the personal knowledge you had of the case, from your own observation in the hospital, and from the pathology that you obtained afterward, and assuming that mercury was

found in the tissues, what would you say caused the death of Mrs. Shepard?

Mr. Kagey: We object to this question for the reason
132 it is not a proper hypothetical question, and does not embrace all of the elements, or evidence, and no proper foundation laid.

Mr. Wyman: Q. I will ask you if you have an opinion as to what caused the death of Mrs. Shepard?

A. In view of what we found, yes.

Q. What is that?

Mr. Kagey: Just a moment, I should like to have this objection ruled on.

The Court: He asked another question.

Mr. Kagey: We object to this, for the reason that there is no proper foundation laid, the witness has not been shown qualified to answer, and for the further reason that the preceding question and this question assume some facts not in evidence, and not all of the facts that are in evidence.

The Court: You may answer the question.

133 Mr. Kagey: We except.

The Witness: Will you repeat the question, please.

(Last question read as above recorded.)

A. I do.

Mr. Wyman: Q. What is that opinion?

A. That she died from mercury poisoning.

Major Shepard had several repeated hemorrhages, and we thought he should be sent to the hospital at Fitzsimons. I think it was about two o'clock in the afternoon and I asked him if I could do anything for him. He said that there was not much that I could do right now, that he was having his personal mail looked after by Sergeant Gresser and that he was sending two telegrams. He told me he was sending one to his mother in Canada and one to his niece in San Antonio.

Cross Examination.

I heard Major Hawley's testimony regarding the Post Mortem examination and he related it substantially as it occurred. I can think of nothing more that was done or anything that was done differently from the way he related it. I specialize in Surgery. I never examined Mrs. Shepard's mouth but did make a complete examination for appendicitis and stomach trouble as related. I examined her heart one day. A few

moments after she had been brought to the hospital to have her teeth extracted Major Shepard came down and said "Come quickly my wife is very bad and I think she is having a heart attack." He said "Bring a hypo." I took my blood pressure machine and stethescope and went upstairs. I went to her room and Mrs. Shepard was lying quietly on the bed. I spoke to her, I remember I said, "How do you feel?" She said that she felt fairly well but she did feel a little bit tired from the trip. At that time I took her blood pressure and it was 90 over 60 which would be probably considered normal in her condition and I casually examined her heart. I did not examine the lungs. I used about 400 cc's of blood for the transfusion. There are two methods of blood transfusion, direct and indirect. I used the citrate which is the indirect method. I stayed with Mrs. Shepard about a
134 half hour after I gave her the blood transfusion and I do not remember that she had a chill. Chills sometimes follow blood transfusions and I would not say it is unfavorable. There was no pathologist at the Fort at the time this autopsy was performed. At the time when Major Shepard called me to attend his wife at four o'clock in the morning the reason I looked for Major Hawley was because Major Hawley had been in attendance on the case and I figured that if she was having hemorrhages that she was going to die and that a medical man should be called. I had a conversation with Major Shepard the day of the funeral. I do not know that he asked me what we had found at the autopsy.

Q. Do you remember his asking you at that time if you had examined the heart?

A. I cannot say, but I know there was some conversation along that line. I am not sure now, he may have asked me whether the heart was examined."

Redirect Examination.

In this particular case there was only one blood transfusion.

Hugh W. Mahon, called as a witness on behalf of the
135 government testified as follows:

I am a Major in the Medical Corps of the United States Army, specializing in laboratory service, which includes pathology mostly. I am now residing in Washington, D. C.,

and during the early part of the year 1929, I was at Omaha, Nebraska, the Seventh Corps Laboratory. I have been doing laboratory work since 1921, that is, since the war.

The viscera of Mrs. C. A. Shepard was delivered to me by Major Paul R. Hawley on Sunday June 16, 1929. As a pathologist I made an examination of that viscera.

Q. Will you just state to the court and jury, in as plain words as possible, the examination you made, and what portions of the viscera the examination was made?

A. The tissue, as received and as it came to me, consisted of the entire stomach, all the small intestines with a portion of the pancreas attached to the duodenum, all of the large gut, including the rectum. Besides this, I also received the entire spleen, one kidney, the pole of the opposite kidney, including the loose tissues attached. There were several mesenteric nodes, lymph nodes and the liver.

Q. Have you a copy of the report you made on this diagnosis of the liver?

A. Yes, sir.

Q. You may produce the same, if you need it to refresh your recollection, and I wish you would take it, section by section, and explain to the jury what you found.

A. The specimens were received in formalin, so that their appearance, as I saw them, was the appearance of fixed specimens, and much the same as the appearance as you see them in the body. The stomach was covered with thick tenacious mucus. Several prominent longitudinal folds were present along the greater curvature of the stomach, converging on the pyloris. The pyloris is the first part of the stomach. The base of this was 15 millimeters, the altitude 25 millimeters, with apex toward the pyloris. I did not measure the depth. The depth was about a four- or five-millimeter depth of that ulcer. The base of the ulcer was smooth, the edges undermined and heaped up. There was no evidence of recent hemorrhage. At the base of the prominent longitudinal folds were several roughly circular, dark-brown, approximately five-millimeter diameter areas of necrosis of mucosa, which on section showed slit like loss of mucosal substance, with brownish area extending about the break in the mucosa into a much wider area of submucosa.

All of the intestinal tract was divided into certain layers; the inside lining is the mucosa, the lining beneath that is the submucosa, and next is the muscular layer.

No pathology was noted in the jejunum, ileum or duodenum, except the wall seemed thinner than normal. Bile-stained mucus clung to the wall of the ilium. The ilium is where it connects onto the big gut. There was no evidence of hemorrhage in the small gut. A few mesenteric nodes were felt in the mesenteric fat. These were small and soft. Solitary follicles were inconspicuous. Serosa was normal, and
136 no gross evidence of congestion. All of these points have a bearing on the pathology as we figure it out.

The appendix was normal, approximately 65 by 6 millimeters. It was not a very big appendix, there was no particular pathology about the appendix.

Begining with the caecum, the entire mucosa of the large gut is stained brownish. This staining is confined to superficial layer of gut wall. In the region of the sigmoid are numerous superficial low elevations of a membranous deposition on the mucosa, rising above the general surface, the largest about 10 by 5 millimeters, and the smallest a pinhead size, the ordinary metallic pin, none of these V-head pins. They tended to be oval in shape and lay longitudinally in the gut. This surface exudate can be easily removed, leaving a shallow ulceration in the mucosa. In the rest of the large gut, there are similar lesions, but discrete; that is, scattered around and not gathered together. Looking at that sigmoid, you would just see one solid mass of necroses; they were not distinctive, but were made up of different portions, the appearance is that of a diphtheritic colitis. Diphtheritic does not mean this patient had diphtheria, it is the type of lesion you get in the throat in diphtheria, and we call this a diphtheritic lesion, and this was a case of diphtheritic colitis. On section, these lesions are confined to mucosa and superficial part of the submucosa. The rectum is comparatively free of these lesions.

We had one whole kidney and a pole of the other. The poles are the upper and lower parts of the kidney. The capsules stripped easily. The outside portion of the kidney is called the cortex, and the inside the medulla. These capsules stripped easily, leaving a small occasional tear in the kidney substance. There were several depressed areas in the surface of the cortex, suggesting contraction of old scars. There were occasional small cysts, seen just beneath the surface, about two millimeters. A cyst is a cavity filled with fluid. The surface vessels were slightly injected, and the

markings of the cortex and medulla were indistinct. As you look in anybody's face, you can recognize certain features in the face, and, if you look at the kidney, you can see these growth structures that we examine underneath the microscope. The pyramid markings were indistinct, and, in the pelvis, you see a certain amount of fat filling dead space.

There were two small pieces of the liver. Grossly, there was no pathology. And there was no pathology present to my naked eye.

The pancreas showed a small tag adherent to the duodenum. It is almost impossible to take out the pancreas without reaching the gut. The appearance was dull and fat-infiltrated. In fact, the pancreas is one of the hardest organs we have to deal with.

The spleen was not enlarged, the capsule not thickened, and, on section, it was congested with splennic nodules inconspicuous. Spleenic nodules are small portions of tissue in the body which in the spleen are gathered into certain definite spots. We can make a guess and examination under the microscope as to what is known with regard to the spleen, but these were inconspicuous.

Under the microscopic examination, I made two sections of this liver ulcer. A large ulcer occupied most of the upper section with the epithelium and glands and muscularis mucosae gone, a small area of muscle inside the lining of the
137 stomach that removes the inner lining from the submucosa, the base formed by fibrous edematous tissue of submucosa, in which granulations are absent. Granulation, or granulated tissue, when you see this granulated tissue, in common, ordinary language, it is proud flesh. When you have a sore on your hand, you see these little points; they are called granulated tissue. These were absent.

At the edges, the appearance of the fibroblastic islands suggest an attempt at repair. Of course, any repair in the body usually takes place by scar tissue. That is a different type of fibrous tissue. At the edge of this, we have some fibrous tissue repair.

The edges of the mucosa adjacent to the ulcer are rolled under, and the mucosa here is lost except bases of glands, and these tend to be distended with mucus. Interglandular strema infiltrated with round cells and occasional eosinophile, round-cell infiltration especially between fundi of glands and muscularis mucosae. The submucosa around the ulcer is ex-

tremely edematous, necrotic in places, fibrotic, very slight red-cell extravasation, infiltrated with round-cells, polys are inconspicuous in numbers.

Mr. Brewster: Explain that.

A. It is hard to explain. In reaction, we have various types of reaction in the body, and, depending on the type, we might and do, more or less, recognize a condition. They bring forth polynuclear cells in the body. The other cells, the mononuclear cells, have a single nucleus. Depending on the reaction we get, we arrive at certain conclusions as to the type of inflammation, and, oftentimes, the type of disease. In this case, the amount of inflammation that was present suggested it was a chronic inflammatory condition. The submucosa is laid between the inside lining and the muscle of the stomach. It appeared to me like the extent of the edema was out of proportion. This submucosal reaction spreads widely beyond the actual area of loss of mucosa. That is, the action beneath this loss was much wider than the superficial loss of tissue. An occasional vessel in the submucosa close to the ulcer is thrombosed. The muscular layer beneath the ulcer area is infiltrated with round cells and edema separating the muscle bundles. The muscle was involved in the inflammation. This was most marked in the circular layer. Submucosa beyond the ulcer area is edematous, slightly perivascular round-cell collections, serosa intact. That is, the various muscular layers in connection with the stomach, and "perivascular" means around the blood-vessels, finding inflammatory reaction in immediate contact with the blood-vessel, as if they had emerged from the blood-vessel and were still clinging to it. I am not saying it does that, that is the appearance. The "serosa" that I mentioned is the outside layer.

It is my impression this was a gastritis, catarrhal subacute and gastric ulcer.

I have four sections of the base of the longitudinal folds; besides this big ulcer, there were several ulcers, at least five, if not more. What their size was I would not attempt to give. They were rather hidden at the base of the folds of the stomach. I had to push the folds outside to see it, because it was preserved in alcohol and formaldehyde, and I had to look for these things to find them. They were not so very obvious. The mucosa is edematous, the epithelium desquamated, the glands actively secreting, interglandular stroma hardly visible, due to grandular swelling, round-cell

infiltration between the fundi of the glands and muscu-
138 laris mucosae. At the base of the plica of the mucosa are areas of necrosis of epithelium with breaks through the mucosa leading into the submucosa. The submucosa here is massively edematous, slightly hemorrhagic, with much fibrin in exudate. If you draw blood and beat it with a spoon, you see certain strands connected with the spoon, that is the fibrin in the blood. In the tissues, you often get this fibrin so you can see it. There was round-cell infiltration around the necrotic area, with the muscularis and necrosa intact.

The diagnosis I made was necrosis of mucosa with ulcer formation, recent lesions in comparison with large ulcer.

In the small intestines, I had a section of jejunum. The epithelium was desquamated. It is hard to cover a surface area in that way. If you see a surface area gone, and know particular signs, it was not due to inflammation. When one sees a loss of substance, with no bodily reaction, it must have been produced after death. So, in this case, it was a post mortem change. It happened in the rubbing of the tissues. You can scrape that stuff off very easily. The folds, or plicae, of the mucosa were marked, showing edema and engorged vessels. An occasional solitary follicle, not hypertrophic and rather dispersed in appearance, was seen. An occasional vessel in the submucosa shows recent thrombosis. The muscularis appears atrophic. Small lymphoid nodule in mesentery is fibrotic. That is one of the small lymph nodules, that veil-like material which is anchored to the posterior wall of the abdomen.

In the small intestine and the ilium, that is the portion that is connected with the large gut, that is the large portion of the small intestine, there were only the fundi of glands of necrosa left. Connective tissue core of plicae remain with mucosa denudes. This connective tissue shows round-cell and eosinophilic infiltration. The submucosa was thin and edematous. the muscularis thinned, especially the inner circular layer.

The diagnosis I made there was a chronic enteritis catarrhal with atrophy.

In the large intestine, colon, the surface epithelium is gone. The cells and intercellular connective tissue forming the lining were filled with brown pigment quite superficial and dense. The fundi of glands remain dilated with epithelium denuded. The interglandular stroma was fibrotic and infiltrated with round cells and eosinophils, especially close to muscularis mu-

cosae. The muscularis was intact, and the submucosa shows an occasional nodule of lymphoid cells close to the muscularis mucosae. There is no infiltration in the rest of the submucosa, and the vessels are not engorged.

In the sigmoid, the picture is an entirely different one. There were four sections through patches of surface exudate. The mucosa shows surface epithelium and glandular epithelium desquamated, the interglandular connective tissue remains, edematous, infiltrated with round and plasma cells with surface layer pigmented by brownish granules as rest of colon. An occasional edematous lymphoid follicle was seen in the submucosa close to the muscularis mucosae. The submucosa was edematous, and the muscularis intact. Areas of mucosa are replaced by a fibrinous edematous exudate densely infiltrated with monos and polys, with a slight hemorrhage into it. This exudate extends into the submucosa, and is limited to area of loss of mucosa. The exudate extends laterally over the surface of the adjacent mucosa, burying the glands under the layer of extension of exudate, as if the exudate were pouring forth over the surrounding tissue, and was held and maintained there by this plug from the original small ulceration, so that the surface was smaller than the surface under it.

The diagnosis I made was a diphtheritic colitis, a
139 pseudo-membranous or croupous colitis.

Two sections of the spleen were made. They showed lymphoid nodules, small, no germinal centers, and widely separated by a mass of tissue composed of medulla sinuses which are filled with large endothelial cells, showing vacuolization. There are no definite blood-vessels; it is a wall, but you can hardly see it. Much pigment was present, the capsule slightly thickened. The picture is the result of low grade toxin absorption, and is not an acute spleen.

The pancreas, in two sections, post mortem necrotic degeneration marked. The outline of the structure, the acini and islands can be distinguished.

Two sections of the liver, the capsule is normal, the lobular arrangement normal, with moderate fat deposition as large droplets in liver strands. A slight increase in pigment deposition in central cells of lobules; with small focal collections of lymphocytes and endothelial leucocytes in interlobular stroma. It has the appearance of chronic interstitial hepatitis, with slight fatty degeneration.

Two sections of the mesenteric nodes showed atrophy of lymphoid elements, dilated sinuses, and increased fibrosis. The diagnosis is atrophic fibrosis. These were in the mesentery of the small gut.

In the kidney, the section shows there is an increased fibrosis, a fibrotic area. One section shows a dimpling of surface due to scar formation. In this area of cortex, there is increased fibrosis, glomeruli sclerosis, with round-cell infiltration through the fibrosed area. One section shows a small cyst beneath the surface. The sections show a tendency to increase of interstitial connective tissue, with round-cell infiltration into it, especially noticeable between tubules of the cortical rays. There is vascular congestion of stellate vessels, with occasional small hemorrhage. The vessels push out and radiate like a star against these stellate vessels because of that. In some of the tubules of convoluted area are hyaline casts, with epithelium of tubules intact. Diagnosis, chronic glomerular nephritis, and subacute interstitial nephritis.

Q. Now, will you please explain to the jury what is meant by edematous?

A. Edematous is the swelling produced in tissue by inflammation, or by trauma. When you get a black eye, it is edematous and traumatic, and there is a fluid liberated into the tissue.

An examination I made, when that tissue was brought to me, was to take scrapings of these intestional lesions and examine it for Vincent's organisms. I did not find any. After this examination a further examination was rather instigated by my own curiousity. I had known Major Shepard at Fort Omaha and I was particularly desirous to avoid getting in this case at all. I went to the Corps Area Surgeon, Major Wasson, who was taking the place of Colonel Skinner. The gross appearance of the viscera made a striking picture in my mind and in view of the fact it was the case of the wife of a Major and I was a Captain, I supggested taking it down to the University of Nebraska Laboratory. Major Wasson said to send it to the Army Medical Museum in Wash-
140 ington instead. It was properly prepared and I sent it there. I kept sufficient viscera to make my microscopic test that I was curious about. I kept a portion of everything I got and later I personally turned over the tissue I had remaining to Dr. Muehlberger, a toxicologist of Northwestern University of Chicago.

I made no tests for dysentery because it is hopeless to try to culture after formaldehyde has been added. I made certain stain specimens. I found no pathology of Vincent's.

Cross Examination.

Q. I hand you page three of your report under toxicology, the toxicological examination, and call your attention to what is said there about urine.

A. Yes, sir, I say her urine in that report is negative of arsenic and mercury. May I amplify that?

Q. Yes, certainly, go ahead.

A. You see, this report is a report that is written—I think it was dated and forwarded with slides to the army medical museum for confirmation on June 28th. That was twelve days afterwards. Meanwhile this urine came in probably a week before the pathological specimen arrived. The slip was marked "Ft. Riley," and the specimen said "urine," a four-ounce bottle, an ordinary medicinal dispensing bottle with a cork, a rubber cork, and with the request for arsenic, but no notation of any name, so I asked when Major Hawley arrived I asked "What is this specimen of urine from, the same case?" He said "Most probably." I included in my report to the army medical museum the complete status of the case. I am not holding anything back.

Q. You did examine it for mercury?

A. Yes, sir; in conducting that same examination you can easily pick up one or the other.

Q. You did not find any traces of either?

A. No, sir.

I examined the tissues I received for mercury. I had five grams of the spleen and liver and five grams of the intestines.

A. —And the same test I used previously I also attempted to check up. I will say in the test, I did get on my analysis a deposit of grayish deposit, which I could not prove to my own satisfaction as a mercury, so I reported as negative.

Unless I am doing that positively I will report negative always. The viscera was sent to the Army Medical Museum on the 20th and received on the 26th. My report was
141 made on the 28th. It was written on the 18th. I did not examine the urine for albumin casts, the request was for arsenic. I did not hear Major Hawley testify that the viscera had been washed before being sent to me.

Q. Will you expect to find such germs after the organs had been washed and preserved in a solution?

A. They may have been shriveled up, but I am sure I would be able to pick them up on the surface of the organ.

Q. Is it not true that Vincent's germs are only found on the surface of the lining?

A. No, any place, you can find them any place. I did not know it before this trial, but I found you can find them any place.

Q. In the heart and lungs?

A. Yes, you would have to check up with the people that report them; people like to get in print about the cases you know—

I never knew of any deaths from Vincent's Angina, the original cause has been Cystonatitis, the original disease was Vincent's, but they did not die from Vincent's. One of the ulcers looked like it was an old ulcer and in my opinion was over a week old; in regard to the month it was a recent ulcer; in regard days it was an old ulcer. I would defy anyone to say how old a gastric ulcer is.

Q. Did the naked eye appearance or the microscopic examination which you made, one or the other show typical evidence of bichlorid poisoning?

A. I was brought up on a kidney in which the kidney lesions were intense and profound. In this case I had a little difficulty in my own mind. I was assured from the picture in the gut I was up against one proposition quite definitely assured, but I would not harmonize the picture to get it to exactly coincide with that, but they are still compatible; that is, they could exist in that way.

Q. Did the microscopic examination of the kidney show regeneration of the solution recognized as diagnostic of bichlorid of mercury? Bichlorid of poisoning?

A. That varies with the type of case, in the administration and how much they got. Those are the typical lesions that they show in text books and pictures in bichlorid kidney. Yes, sir, that is the typical bichlorid kidney.

Q. How did you find the kidneys, just describe the condition of them?

A. I did not weigh them. . . . . I really should have, but I have a fair idea of what the appearance, the approximate size was. I would say it was 150 grain kidney and it

was not particularly an acute kidney in my opinion.
142 The gross appearance, it was not a remarkable kidney like they describe in the textbooks in a bichlorid poisoning.

The condition of the liver was beginning of degeneration, mostly around the central vein, with fatty deposits, a reaction in the fibrous tissues of the liver, the microscopic lobules which make up the liver, which is a reaction in many toxemic cases.

I spoke of Thama in the intestine. It is not an uncommon finding in both infections, a toxic poison. I have seen a variety of autopsies performed, both by pathologists and by coroners. I should dislike to say just the right way, the way for instance the coroner in New York or Omaha might perform an autopsy.

Q. Did you make a statement to Major Bruns in Denver?

A. Who? I saw Major Adelot and he presented me with a list of forty or fifty questions to answer and I told them I would answer them to the best of my ability, if it did not interfere with my side of the case.

Q. I will ask you if you made a statement that the autopsy made in this case was rotten?

A. As a pathologist, that autopsy was not an autopsy, but that is my idea of an autopsy.

Q. That is what I am getting at, your idea of an autopsy, and you are still of that opinion, are you Doctor?

A. I am still of the opinion that as far as the cause of death is concerned it was a pretty good autopsy.

A perfect autopsy should include everything in the body, but it is never done. It is rather hard to make a record while the autopsy is being performed unless you have a stenographer. I usually write my report up after I finish the autopsy.

Q. Did you not also state to these gentlemen at that time, "Those small ulcers of the stomach could be due to trauma, probably due to a recent blood transfusion?"

A. I cannot say how I said it.

Q. Did you say that, those words?

A. Would it make a lot of difference?

Q. They were taken down by a stenographer?

A. No, not that I know of.

Mr. Brewster: We object to it as not proper cross examination.

Mr. Kagey: This may be answered—

Mr. Brewster: We object to it as not cross examination.

The Court: Sustained.

A. (Continuing) I was on leave at this time and in going down to Denver, I was going to Western Nebraska and I thought I would stop in Denver and see how they conducted autopsies. In going through the autopsy room I was present when Major Shepard was doing an autopsy on a patient he had in Denver. He spoke to me and asked me how I was getting along and then he said if it was not out of my
143 way, to meet with some of his attorneys that night, I think it was. I forget exactly how it did come up. I have no particular grudge against anybody and I want to be perfectly fair and I thought I could not do any damage. Anyway I consented, so I will tell the truth. I went to see Colonel Adelot and Colonel Adelot assured me, in the usual gold brick way, that I was just to express an opinion, you know.

Mr. Kagey: Now, if the court please, we object to all the statements as improper and not explanatory, and ask they be stricken out—

The Witness: I have not gotten to the important part.

Mr. Kagey: —And that the jury be instructed to disregard it.

The Court: Very well, gentlemen, you will not consider those things that the Major has just told you. Now go ahead with the questions that were asked you.

A. (Continuing) These questions were a list. They did not particularly have any bearing on the case as far as I was concerned and they said to me, "What is your opinion about this sort of thing?" I said, "If I was in Major Shepard's place I would look up that autopsy and that transfusion to a great extent." I think Colonel Adelot will confirm that because the weakest points apparently were those two points.

By Mr. Brewster:

Q. Was this before or after you testified before the Grand Jury and had taken an oath not to reveal your testimony?

A. Unfortunately, sir, it was after. I saw a gold brick—

By Mr. Kagey:

Q. Did you tell them you had told the Grand Jury anything of this kind?

A. No, sir, none of this evidence I gave before the Grand Jury I told you.

Q. Why certainly?

A. I am very definite about that, I was trying to help you out.

Mr. Kagey: We move that this statement of the witness be stricken out and that the jury be instructed to disregard it for the reason that it is a voluntary statement and not responsive to any question.

The Court: It may be stricken out and you will not consider it, gentlemen.

Mr. Kagey: Let the witness refrain from making these voluntary statements. I shall try to ask questions that may be answered.

The Witness: I am sorry, I am sorry.

The depressed condition of the kidney was put down as chronic because one does not get that condition in a day or a week. It is barely possible that the condition could be brought on by the prolonged use of alcohol.

144 Q. Could the large droplets and the chronic interstitial nephritis that you found in the liver, have resulted from alcoholism?

A. One may find worse changes than that in the liver if they have been drinking very much.

There would be a certain pathology where the certain person was well known to be a heavy user of alcohol, depending upon the nature of the alcohol. There was a brown stain in the large gut and it is my impression that it might be due to a hemorrhage laying in contact, and the surface drawing the whole blood. I related everything that had been done with reference to the analysis of this viscera.

Government's Exhibit 7 being a photograph of Zenana Shepard taken in 1928 was here marked, offered and received in evidence without exception.

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145 Edward B. Vetter called as a witness on behalf of the government and testified as follows:

I am a Colonel in the Medical Corps, United States Army, and now live at Washington, D. C., and I have been in the Army 28 years.

I have been engaged almost exclusively in various kinds of Laboratory work which requires me to make research for poison at times. I am able to take the viscera of a person and make tests on it for metallic poisons. Metallic poisons

are arsenic, lead, mercury, bismuth, conium and various things of that kind.

I received the viscera of Mrs. Shepard from Major Mahon which came to me in a kerosene oil can, closely sealed and we had to open it with a can opener. The first thing I did was cut out a block of tissue of everything I had and sent that to Major Ash in the Army Museum for pathological examination. He is a pathologist. With the remaining viscera I examined it for metallic poisoning. I took 500 grains of tissue, including the large part of one kidney, which was all that was left, the piece of liver, the spleen and made up the rest of the weight with the large intestine. The organic matter was destroyed. I followed the Fresenius v. Babo Method, and the tissue was destroyed with Hydrochloric Acid. Potassium and Chlorine were added as an oxidizing agent. A yellowish clear solution was left. The excess acid from that is evaporated and no precipitate, which indicates no metals of the first group, which includes silver and lead and mercury, when it is in the form of calomel. The solution was then treated with hydrogen sulphid. We got a heavy black precipitate we were not looking for. A heavy black precipitate is suggestive of a half a dozen different metals. Arsenic is a yellowish-orange precipitate and also antimony. The precipitate of mercury is black. The precipitate is then treated with ammonium hydrooxide. It was then tested for arsenic, antimony and tin and they were not present. The remaining precipitate is then destroyed with nitric acid. Nitric acid resolves copper, which might be a black precipitate, and bismuth, lead and conium. None of these metals were
146 present. The precipitate was then put into solution with hydrochloric acid and a slight amount of potassium chlorate, and tested for mercury.

Three tests were employed. The first was a treatment with stannous chloride. With this reagent, mercury gives a heavy white precipitate, which is calomel. That is, the mercuric chloride then in the solution will give a heavy white precipitate of mercuric chloride, and that precipitate was secured. The next test was to treat the solution with a small amount of potassium iodid. With this test one should get a red precipitate or mercuric iodid. That red precipitate was secured. The final test was to immerse a strip of copper foil in the solution and under such circumstances, when mercury

is present, there is a metallic mirror, a bright mirror is deposited on the copper, which can be polished and that was obtained and the copper then cut in small pieces and placed in a tube and heated and globules of metallic mercury were deposited on the side of the tube. (All the complete details of how the analysis was made to get the mercury are not set out.)

Q. Will you give your judgment of how much mercury you had?

A. The amount of the precipitate I had, and the amount in the various tests, there must have been somewhere between two and three grains present.

Q. Does mercury, after it is taken into the body, tend to eliminate itself?

A. Many times, quite rapidly.

Q. Would you say, if mercury had been administered to this woman, that a portion, at least, of it would have been eliminated before her death.

Mr. Kagey: We object to this as leading and suggestive.

The Court: He may answer.

Mr. Kagey: Exception.

The Witness: May I hear the question again?

The Court: Read it.

(Last question read as above recorded.)

A. I should say it was extremely probable.

I made a gross inspection of the viscera.

Q. From what you saw there, from your inspection of the viscera, from what you found in your examination and test for mercury, what would you say was the cause of this woman's death?

A. I think she died of mercuric poisoning.

When I spoke of getting calomel that does not mean in the slightest that calomel had been administered. In the test I put this precipitate in solution with hydrochloric acid
147 and in the solution it was present as bichlorid of mercury and that particular test merely turned it into the mercurous chlorid known as calomel, which is a chemical test. There is no way of determining in what form the mercury got into the body. It is the mercury I looked for.

Cross Examination.

I base my opinion that Mrs. Shepard died from mercurial poisoning from the fact that a large quantity of mercury

was present in the organs. That is really sufficient. I did not observe the appearance of the kidneys, particularly, because when I received them they had been in formaldehyde for sometime.

Q. Is it not a fact that, in mercury poisoning cases, the kidney usually presents a very striking symptom?

A. I think the striking thing is chiefly microscopic.

Q. You did not examine microscopically?

A. No, sir, not at all.

Q. You did not, then, examine microscopically?

A. No, I made no microscopic examination whatever of the tissue.

I estimate I got two or three grains after an analysis of the entire amount.

Q. How nearly can you estimate quantity?

A. It cannot be very exact, but one can make a close guess when you know what these various things look like. This was not a quantitative analysis.

Q. As a matter of fact do you have any scales that would weigh that small a quantity?

A. Oh, absolutely.

Q. Why did you not use them, or could you?

A. The reason why I did not do it is a sad story: I did not expect to find anything and I made no preparation for making a quantitative determination.

A lethal dose is given three to five grains, but two grains have been known to cause death. Patients have been known to recover from more than that, but only when the recovery is immediate and not unless it is promptly removed from the stomach it will cause death every time. The reason I say she died of mercurial poisoning without knowing all of the history of the case is, because all of the authority on such cases indicate it is not possible to have any such quan-
148 tity of mercury in the tissues except as a cause of death. Organic compounds sometimes give a dark color precipitate, but it is a well recognized fact that the method I used is an accepted method for getting rid of the organic matter and it does remove them. There is no difference of opinion between great minds in chemistry and pathology about the advisability and correctness of texts on this matter. This analysis is a simple elementary analysis such as they teach college boys when they start in organic analysis. I am not great on authority myself. I do not say it is the best and only

authority. All possibility of error is excluded by the fact that I went ahead and found mercury. The reason that I did not weigh it was because I did not run this test as a quantitative method from the start, consequently when I got to the point where I knew what I had, I was not able to make a quantitative determination. I said I thought the organs showed evidence of bichlorid of mercury poisoning. I do not claim to be an expert pathologist, but I probably know as much pathology as most doctors. I have taken pathology in my medical training. The only important thing about the appearance of those organs at the time I received them that I can call attention to, was the fact that there was evidence of a very violent inflammation in the portion of the stomach I received, and the large intestine, in particular, was covered with this diphtheritic membrane already described. I am not sufficiently familiar with stomach ulcers to tell by looking at them whether they are made by mercury or some other cause.

Q. Could you tell, by looking at that diphtheritic membrane, and this condition, whether or not it was caused by mercury poison?

A. Not if that was the only thing I had. I know of no other poison that strikes the stomach and the large intestine and skips the small intestine in that way.

I base my opinion this death was caused by mercury poisoning from the fact I found the mercury there.

Redirect Examination by Mr. Brewster.

Q. How would the mercury, if administered to the
149 stomach, get into the kidney?

A. A certain proportion of the mercury is dissolved in the passage into the blood stream, and eliminates by every organ in the body, through the urine and the bowel, very largely in the sweat and saliva, some people say in the bile, some say not; at any rate, it is very largely excreted, and, in order to be excreted, it has to pass into the blood stream, and that is how it gets into the kidney.

Q. What you found was what was left in those organs?

A. Yes, sir.

Recross Examination.

There may be a considerable amount of mercury excreted through the urine. Authorities differ on whether the pro-

nounced method of excretion is through the urine. One authority has said that he found 20% mercury in the liver and 15% in the kidney and there is nothing absolute about the matter. I think that nearly always mercury can be detected in the urine, but one would have to have a considerable amount in order to make any sort of estimation. I should dislike to try to find mercury in four ounces. In this case I would not say that the kidneys were damaged so badly they could not excrete urine. The condition of the kidneys where a patient died of mercuric poisoning depends largely on whether he died an acute death or prolonged death. A large dose of mercury would probably paralyze the function of the kidneys. It is very probable that small doses might permit the kidneys to function, and work, until the death of the patient. I think it is very probable and it is the general rule that mercury is diffused regularly in different parts of the same organ.

A. Exceedingly very probable. If it is present there, it is present in the matter of excretion, and probably would be very evenly distributed in an organ like the kidney, for instance. You see, the kidney function is made up of an innumerable number of microscopic portions, and the blood goes to all those portions, and is distributed around, and, if the poison was in the blood, it would have to be pretty nearly evenly distributed in the kidney.

Q. While it would not have to be in some of the other organs; is that right?

A. Yes, I think it would be. The blood goes everywhere.

Q. You think it would be evenly distributed in the
150 organ, in the particular organ?

A. Yes, sire, all of the amount. One case might vary from the amount in another case.

Q. As a matter of fact, there might be cases that would be different from that rule, would there not, the rule you have stated, wherein the blood would carry to each part of that organ evenly?

A. I do not see much escape from that.

Q. Are you familiar with the authorities on that proposition?

A. I do not claim any tremendous familiarity with the authorities, although I have read most of them.

Mr. Kagey: That is all.

Redirect Examination.

By Mr. Brewster: Q. You spoke of the elimination of mercury after it had been taken into the stomach; I will ask you if that process of elimination ever has any effect on the mouth?

A. Oh, very decidedly.

Q. What is it?

A. It is what we call a mercuric stomatitis; it is an inflammation of the mouth.

Mr. Brewster: That is all.

C. W. Muehlberger called as a witness on behalf of the government, testified as follows:

I live in Chicago and am a chemist and toxicologist and have been engaged as a chemist since 1915 and as a toxicologist since 1923 and I am Assistant Director of the scientific crime laboratory of Northwestern University of Chicago and Assistant Professor of toxocology in Northwestern Medical School.

I have been called upon to make tests for mercuric poisoning and have had approximately 25 fatal cases. On September 3, 1930, I met Major Mahon of Omaha and he delivered to me the container I have, which was sealed with red sealing wax. It contained a white colorless fluid with some portions of what appeared to be internal organs. I have laboratory equipment for making analysis of this kind. I have scales which I can weigh to one-thousandths of a milligram. There are 30,000 milligrams in an ounce. I found in the jar seven pieces of stomach wall which weighed 36.7 grams, slightly over one ounce. Four pieces of intestinal wall which weighed a total of 25 grams; seven pieces of kidney, seven slices of kidney, which weighed a total of 20.4 grams. Then, some small slices of liver, four slices, which weighed 6.3
151 grams and four slices of muscle which weighed 4.4 grams. The material was contained in a white colorless fluid, which had some turbulent, suspended, white, flaccid, suspended matter. There was about 97 cubic centimeters, or, roughly, 3½ fluid ounces of liquid in the jar. This liquid had an odor of formaldehyde, which is commonly used to keep such specimens from decaying.

I made a test using a modification of the method originally worked out by Fresenius and von Babo. I am familiar with

the effect of mercury, although I am not a pathologist. Mercury gets into the various organs of the body, aside from the stomach and intestines by means of the blood, that is, it is absorbed by the stomach and intestines, and carried around to the various organs of the body and deposited more or less in these organs. The blood would carry the poison into the kidneys and it would be equally distributed through the kidneys.

I made a test by taking the stomach and intestine specimens, there were 36.7 grams of stomach wall and 25 grams of intestinal wall and I put these together and analyzed the combined material for mercury. I took the 20.4 grams of kidney tissue separately and analyzed it alone, then I took the small portion of the liver, 6.3 grams and these pieces of muscle, which I could not identify and analyzed them together, so I had three different groups of internal organs which I analyzed. I also analyzed the preserving fluid.

If an organ was placed in a fluid containing poison most of the poison would remain in the fluid. An organ of a person dying from mercuric poisoning would retain the mercury because it would be largely fixed in the tissue. In making the test I took a clean wooden block and razor blade and sliced the organs up into small particles and placed them in four different flasks; one containing stomach and intestine, one containing kidney; one contained a small part of the liver and muscle and the fourth contained preserving fluid and introduced into the flask to approximately half the weight of the organs. Half the organ weight of hydrochloric acid was added; a gaseous chlorin, chlorin gas, was then
152 bubbled into the flask, which makes a powerful oxidizing misture. This was done at room temperature for a period until the chlorin had oxidized the mixture. It first turned to a soupy material, turned yellowish and finally was practically entirely dissolved. I blew a current of air through the flask in order to remove the surface of chlorin gas. The test passed from white to blue indicating no free chlorin left in the solution. About one-half grain of sodium sulphid was added to each flask to make sure no free chlorin was left and then diluted the material with an equal volume of water and filled each specimen. Some globules of fatty, oily material remaining were filtered off. The filtered clear liquid was then treated with hydrogen sulphid gas, which caused a black material to separate. This I filtered off on a finely

powdered asbestos mat, called a Gooch crucible. This separated the dark-brown or black in color powder from the rest of the liquid and washed it first with water then with warm nitric acid. Then I took the powder and asbestos and put them in another container and added drops of strong bromin water and a little hydrochloric acid to dissolve off the black powder. In the case of the stomach and intestines I found quite a bit of black material. In the case of the kidneys, somewhat less black material. In the case of liver and muscles, I found very little black material and in the case of the preserving fluid no black whatever, which barely precipitated, and you could just barely see the white color of the asbestos mat.

The solution of this black material was then electrolyzed. I passed the current for six hours in each case, picking out my cathode, which is a platinum gauze cathode, washing first with distilled water, then with alcohol, then ethyl, and allowed to dry in a glass jar filled with calcium chlorin, which takes up moisture. I took the electrode out and weighed it carefully in the balance, which weighs thousandths of a milligram, and which is accurate to ten-thousandths of milligrams. After getting the weight of platinum cathode, plus the deposits, I placed the platinum cathode in a glass tube, in an electric furnace and heated it carefully. This material when it reached a cool part of the tube, continued on turning back into a liquid form and continued into globules of silvery
153 metallic material. I then took electrode out of tube and weighed it again and the difference in weight was the difference of the material I had turned off by heat and my weight of material determined in that manner. When this procedure is followed the only metal which will deposit on the electrode, under these conditions and turn off by heat, is mercury. I made sure it was mercury by a test in which I took the material in the tube I had heated by putting a crystal of iodin in, and iodin reacts to produce mercuric iodid, red in color and I obtained a deposit in this case of a pale red material. I was able to determine by many weighings how much mercury was present. In the case of the combined stomach and intestines I found there was 3.6 milligrams of mercury. In the case of the liver there was 2.1 milligrams of mercury. In the case of the combined specimens of liver and muscle I found .7 milligrams of mercury. And in the fluid preservation there was .1 milligram of mercury. (All the

complete details of how analysis was made to get mercury are not set out.)

Q. Are you able to ascertain approximately the amount of mercury that would have been in these various organs in toto?

A. Yes, I could ascertain the weight accurately for the kidney. The estimate would not be as accurate for the stomach because I had not only stomach, but intestines; and likewise for the liver, I did not have pure liver, but I had liver plus the muscle. I could give an accurate estimate in the case of the liver and kidney, and somewhat a less accurate estimate in the case of the stomach and liver.

Q. What is your estimate of the kidneys, both of them?

Mr. Kagey: Just a moment, we object to this unless it is shown this witness knew the size of the kidney, the manner in which it had been handled and also, was familiar with the weight of the viscera. In other words, it would be a mere guess.

The Court: You are able to ascertain from the part you have how much you got altogether, I suppose?

The Witness: I have dealt sufficiently with the human organs, I know of, from my own knowledge, what the weight of the kidneys is, although I am not an expert anatomist, and do not pretend to be such in Court.

The Court: You may answer. Read the question.

Mr, Kagey: Note an exception.

(Last question read as above recorded.)

A. The weight of a kidney, the average adult—

Mr. Brewster: I mean of the mercury that had been in the kidney of the adult.

A. I should like to tell how I arrive at that figure.

Q. Very well, go ahead.

154 A. The weight of both the kidneys in an average adult female is approximately 275 grains. I had 20.4 grains of the material, so the proportion between 20.4 grains and 275 grains, by that I can calculate the amount of mercury which would have been contained in both the kidneys, and that was 28.3 milligrams of metallic mercury, or slightly less than one-half grain of mercury. If this were calculated to mercuric chlorid, this would represent slightly over half a grain of mercuric chlorid, or bichlorid of mercury.

Q. Estimate the whole of it, all of the viscera, how much would you say?

A. I should have to assume—

Q. Assume a normal weight of a woman, what is the total?

A. I should judge there was between two and three grains of mercury in the stomach, liver and kidneys.

(Government's Exhibit 8 identified and received in evidence, which was a glass tube sealed at both ends, containing mercurial iodid, which was obtained from the stomach and intestines.)

Mercury in the form of mercuric iodid loses its metallic or silvery color and takes on a pink or reddish color such as in the tube. I got some metallic mercury preserved in metallic form, which is the mercury I obtained from the kidneys. Mercury is one of the exceedingly few metals which is liquid at ordinary temperature.

(Government's Exhibit 9 offered and received in evidence and was shown to the jury, a small glass tube sealed at both ends, having a deposit of metallic mercury inside.)

The white spot in the tube (Exhibit 9) is the deposit of mercury obtained from 20.4 grains of kidney in this analysis. I have had considerable experience with mercury and mercuric poisoning and there was enough in this viscera to cause death.

Cross Examination.

I am not a physician. I am primarily a chemist.

Q. You are a chemist, that is what I thought. It is a fact, Dr. Muehlberger, is it not, that Whitthaus lays down the rule in Volume 4, at page 212, that in attempting to calculate the total quantity in the cadaver it is never permissible to assume that the amount separated from a certain fractional part of the body, bears the same relation to the entire amount present that the weight of the fraction examined to that of the body. That the distribution of the poison in the different organs and tissues is uneven under all circumstances and the quantity in one part is no indication of that in any other, except insofar as it is known that certain organs retain a greater quantity than others? That is a standard rule today, is it not?

A. This is entirely correct and is not in—

Q. Just wait, I am not through: "And even when
155 the quantity in a given organ is calculated from the amount found in a known fraction of that organ, the calculation is only reliable if the sample is a fair representative of the

whole taken from the finely divided and thoroughly mixed whole?"

A. That is only true in a degree.

Q. It is true, however, is it not, Doctor?

A. No, it is not.

Q. You think it is not true? All right, "It is not safe to assume, for instance, that because a given quantity of arsenic is found in one lateral half of the brain the entire organ contains quite that amount." Is that right?

A. I would not say it would necessarily contain exactly twice that amount, but an estimate of twice that amount would not be very far from the truth.

Q. You differ with Mr. Whitthaus in that respect?

A. I do in that respect.

Q. You are, you say, thirty-four years of age?

A. Thirty-four and one-half.

Q. Thirty-four and one-half years of age, you are an assistant professor at Northwestern?

A. Yes, I am.

Q. You made a statement that you thought there was enough mercury found to cause death. Do you mean according to your estimate of the amount of mercury you found, do you mean that?

A. I base that statement largely on what I found in the kidney alone.

Q. Did you see the whole kidney?

A. No. I only saw the portions which were given to me.

Q. Did you examine the small piece of kidney. I believe you had, you said it was a small piece.

A. Really several small pieces.

Q. Several small pieces you had?

A. Yes.

Q. From your examination of those kidneys, that is the clinical appearance, did you say those kidneys appeared to be what is known as mercurial kidneys?

A. If the court please, I stated in the beginning I was not a pathologist or competent to give an opinion as to a pathologist symptom. Frankly, I would not know a mercurial kidney if I saw it, except by chemical analysis.

Q. But you are a chemist?

A. A chemist, an analyist, not a toxicologist.

Q. I understood you did give an opinion, I may
156 be mistaken, as to the cause of death of this woman.

A. No.
Q. You did not?
A. No.
Q. I thought you were asked the question.
A. I was asked the question if that dose was sufficient to cause death. I said it was. I am not attempting to tell the jury that death was caused by mercurial poisoning.
Q. Now I suppose if you were not a pathologist you probably can not answer this question but perhaps you can, however. If a trace of mercury can be found in three and one-half ounces of preservative, could not mercury be found in three or four ounces of urine if it were there?
A. I think if it were there it could be found.
Mr. Kagey: That is all.
Mr. Brewster: That is all. Sergeant Rose.

Winslow A. Rose called as a witness in behalf of the government, testified as follows:

I am a Sergeant in the United States Army and the pharmacist at Fort Riley. I have in my possession several prescriptions prepared by Major Shepard. Government's Exhibit 10 is a prescription in the handwriting of C. A. Shepard which I filled. I put eight grams of mercury in this prescription. I have been in the dispensary at this time three years and eight months and have been there about two years at the time this prescription was made. I never knew of bichloride of mercury dissolved in alcohol being prescribed.

(Government's Exhibit 10 offered and received in evidence, being as follows:

"Station ....Apl 8 191.... For Office Attending Surgeon, Rx

Gms. or Cc.

"Alcohol & Mercury bichlorid 240

"No. N-8053, C. A. Shepard, Surgeon, U. S. A. (On reverse side:) One tablet of bichlorid of mercury was placed into the 8 oz. as requested by C. A. Shep."

157 After this prescription was filled I had verbal requests from Major Shepard for bichlorid of mercury, that was in December, 1928, and March, 1929. He came and asked me for the tablets for use in the house. I was pretty busy and he made the statement that he wanted it for a tub. He got a half dozen tablets at that time. I did not

have white mercury bichlorid tablets there, I had blue tablets. I had bichlorid of mercury in white powder form at the dispensary. Every officer in the Medical Corps had access to that at any time, including Major Shepard. The officer of the day carried the keys to the dispensary and every officer at the hospital would be officer of the day approximately every five or six days. I have other prescriptions signed by Dr. Shepard while Mrs. Shepard was ill.

(Government's Exhibits 11 to 18 are identified.)

Exhibit 11 dated 3-1-29 signed by C. A. Shepard for spirits Fermenti for Mrs. Shepard. Government's Exhibit 12, dated 6/4/29, signed by C. A. Shepard, for alcohol for Mrs. Shepard. Government's Exhibit 13, dated 5/14/29, for Potasii Arsenitis for Mrs. Shepard, signed by C. A. Shepard, three drops in water as directed. Government's Exhibit 14, dated 12/25/191...., for Alcohol Ethyl, for Mrs. C. A. Shepard, signed by C. A. Shepard. Government's Exhibit 15, dated April 12, 1929, for Alcohol for Mrs. C. A. Shepard, signed by C. A. Shepard. Government's Exhibit 16, dated 6/25/29, for H T Morph sulph 1/8 1 tube of 20 tablets, for Mrs. C. A. Shepard, signed by C. A. Shepard. Government's Exhibit 17, dated 6/4/29, for whiskey, for Mrs. C. A. Shepard, signed by Hawley. Government's Exhibit 18, dated 6/1/27 for Ethyl Alcohol, for Mrs. C. A. Shepard, signed by C. A. Shepard. Government's Exhibit 13 is Fowler's solution of arsenic.

Ethyl alcohol is grain alcohol and the kind some people drink. The whiskey and alcohol prescriptions run from four ounces to a quart. Prescription No. 17 was written by Hawley. Major Shepard also got about 200 empty capsules for his wife, but not at the same time he got the Bichlorid of Mercury tablets. He never got anything else at the time he got the Bichlorid of Mercury tablets.

Cross Examination.

158 There is nothing unusual about the Doctor getting capsules or getting mercury. It is used a great deal for disinfectants, for ear trouble and things of that sort and it never struck me as unusual to have these prescriptions filled. In fact, Major Shepard or any other Doctor could have gone there and gotten mercury and not said anything about it.

Redirect Examination.

Q. How did you happen to put in the eight grains of mercury 240 c. c.

A. The man that brought the prescription told me that Major Shepard requested that be put in.

That man was Private Brown.

Recross Examination.

The only record made of that prescription was on the prescription itself. Private Brown was the assistant in the attending surgeon's office and I believe he is at the hospital at Fort Riley at the present time. Major Shepard was officer of the day about every fifth day. He carried a medicine case which had a container for bichlorid of mercury tablets. Approximately all doctors have.

Q. Approximately all of them have and there is not anything unusual in the world about a doctor having bichlorid of mercury tablets in his possession, is there?

A. No, sir.

Mr. Kagey: That is all.

Hugh W. Mahon recalled as a witness in behalf of the government, testified as follows:

From the pathological examination I made of that viscera and assuming there was a toxicological examination made of that viscera and mercury was found, I have an opinion as to what produced the condition I found in my pathological examination.

I believe it was compatible with mercury.

The type of lesions present was the lesion that you
159 find in mercury poisoning and the only doubt I should have to remove in my mind was that the mercury was present, and with mercury present, the lesions are perfectly explainable.

Q. Is that true of the lesions that you found in the stomach and large intestine and kidneys that you examined?

A. Lesions found in practically all the tissue are compatible with mercury and are found in mercury. The addition of mercury after death could not have produced my pathological findings.

Q. Is there anything else about that examination you

made that you want to explain to the jury that would show that it was mercury poisoning?

A. The description of the pathology in regard to the symptoms as you look at your picture in the body, you see it in various phases; you see it in the liver, you see it in the intestines, you see it in the stomach, you see it in the kidneys, you see various lesions present, and the pathology of the highest types can be produced by various causes and you attempt to fit them much like a jig-saw puzzle, and attempt to explain the lesions found, if you can, in one picture, or several pictures; in this case the type of lesion found in the gut, which was a high characteristic and prominent lesion, so startling one could not miss it; that could be explained, if you saw a little picture of it, by dysentery condition, but when you begin to check up the distribution in the gut and in relation to the spleen and lymphoid, you could not determine it, you would have to seek a toxic cause, for mercury, and if mercury has been proven, it explains to me perfectly what the lesions were. By toxic I mean a poison. Toxin is a substance in the body that produces death of the tissue; if it produces enough death of tissue, it produces death of the individual.

Recross Examination.

All the ulcers in the stomach could be explained on the basis of mercury poisoning.

Redirect Examination by Mr. Wyman.

Q. Doctor, is there any peculiarity about the action of mercury on the stomach, the big gut and the little gut, and the liver and the kidney?

A. In the immediate taking of a large dose of mercury, if it were a solution of mercury, a concentrated solution, the lesion would be in the mouth, in the esophagus, and in the stomach, and possibly extending into the small gut.
160 Mercury is absorbed from the stomach, and is re-excreted back partly through the stomach, and through the intestine and the kidney. It is apparently a constant process of absorption, excretion and reabsorption, and the point where this apparently takes place most is in the original lesion; in the stomach you find very narrow lesions there, and, where the case persists beyond the first couple of days, you will find your peculiar distribution in the big gut, and in the

kidney. If it is an acute dose, the picture will vary according to the dose, undoubtedly. In the big intestine, as you look at the case that has persisted for several days, a week or more, you will find that the stomach may be in the healing stage from a previous dose. You will find the small intestine practically with nothing in it, and you come to the large gut, and you see there a peculiar picture of the large gut being involved and the lesions being especially marked in the sigmoid flexure, in the big gut. That is a picture that has been impressed upon me several times, and, when I do see it, I am suspicious.

Mercury has a peculiar characteristic of hitting the stomach, and hitting the big gut and missing the small gut. I know of no substance outside of mercury that does that.

Recross Examination.

In my examination of those ulcers it did not look like tubercular bacilli, because tuberculosis is a very distinct picture in the gut.

Q. Doctor, if you were able to determine this was a mercury case, could you determine from its appearance whether there were any signs as to how the mercury, if it was mercury, was administered?

A. From the appearance, and the pathological examination I could not definitely state, because, if the case survived the toxicological appearance in the big gut, it will be practically the same, no matter how it is given; but the existence of ulcers in the stomach aroused a suspicion in me that it might be given by the mouth.

Q. By the mouth?

A. Yes.

Q. It caused a suspicion. Did you hear the testimony of Dr. Hawley here yesterday?

A. Yes, part of it.

Q. Did you hear a statement by Dr. Hawley that he thought he was called too late to do any good, that she was doomed at the time he was first called to see her?

A. I overheard that statement.

Q. Yes, you overheard that statement. Now, from your knowledge of mercury poisoning, would you say that poison administered, if it were administered on May 20, would cause a patient to linger until June 15, twenty-six days, and make

what seemed to be a marked improvement during a part of that time, and then become weaker and die?

A. It is possible.

Q. It is possible?

A. Yes, sir.

Q. Would you say that it was probable?

A. And even probable.

Q. I will ask you, doctor, if most of the authorities, if it is not a fact that most of the authorities say that, where there is a heavy dose given, that death usually results in anywhere from two to five days?

A. If you insist upon "heavy dose", yes.

Q. A heavy dose.

A. Yes.

Mr. Kagey: That is all.

Redirect Examination.

Q. What in your mind would the two ulcers indi-
161 cate as to the manner of dosage?

A. As I pictured it to myself, this localization, considering that, I joined all of this picture into a mercury picture; the localization of this large ulcer and the older ulcer in the pyloris of the stomach, suggested to me the only way it could produce that amount of erosion would be a tablet laying in contact there, or a capsule dissolved locally. That is just my impression.

Q. Is there anything there to indicate whether or not there had been more than one administration?

A. The appearance of more recent ulcerations in the stomach suggest that there was another—it could possibly be another dose of mercury given, although, if the stomach was re-excreting mercury into the stomach, it is possible to have ulcers there, too, for that reason.

C. W. Muehlberger, recalled as a witness on behalf
162 of the government, having been previously sworn, testified as follows:

I know of the book written by Peterson, Haynes and Webster, referred to heretofore. I know Webster and I took his place as toxicologist to the coroner of Cook County, Illinois. The pay I receive here at the trial goes into the funds of the

Crime Laboratory of the Northwestern University. I have no financial interest in it whatever.

Cross Examination.

My position now is coroner's toxicologist of Cook County, Illinois.

James E. Ash, was called as a witness on behalf of the government, testified as follows:

I am a Major in the Medical Corps and at present I am stationed in Washington at the Army Medical Museum. My profession is medicine. I am a pathologist, I graduated from the University of Pennsylvania and the Army Medical School. I have been a pathologist about twenty years. I have had considerable experience in that work. I got the viscera that Col. Vetter testified he turned over to me and I made a pathological examination of it. There was a portion of the stomach, small intestine, two pieces of large intestine, the first portion of which is attached to the appendix, another portion which came apparently from the lower portion, the sigmoid flexure, a piece of the pancreas, spleen, liver and kidneys.

The first organ examined was the liver and there was an evidence of a toxic reaction. Toxic means poison, the toxic reaction in the liver is evidenced by the presence of cells in the tissue between the lobules of the liver. These cells were both the cells we see in acute inflammations and the cells we see in more chronic inflammations. The liver cells showed a little degeneration, spoken of as "cloudy swelling". The degeneration of a cell is the reaction to some injury, usually a toxin in the broad sense. A necrotic cell is a dead cell; a degenerated cell is an evidence of less damage. I am giving the microscopic condition. There was an occasional
163 fat droplet in the liver cells. It absolutely showed a toxic condition. The chief change in the kidney was degeneration again of the cells which lined certain tubules of the kidneys. Tubules are the structure which carry the urine from the secreting element in the kidney down to the pelvis of the kidney, where it is collected and carried into the bladder. These tubules are lined by certain types of cells. These cells showed a very severe degeneration in certain of the tubules. Some of these cells were necrotic; that is dead.

The damage had gone beyond the stage of degeneration and some of these necrotic cells have become loosened from the tubular wall. (Witness further described his pathological findings in detail:)

The next thing examined was the colon or large intestine. This was the seat of a very active croupous inflammation. The pathological term for this type of inflammation, accompanied by a false membrane, is also spoken of as diphtheritic condition, and that is a pathological term, and not a clinical term. There were several sharply-defined ulcers, filled with this croupous type of exudate, and this material had spread out from the ulcer over the mucous membrane that had not been exudated, and that is where the false membrane comes in. The entire submucosa, that is, the tissue under the lining membrane, was edematous, that is, filled with a watery fluid. That is a pathological condition and not a natural condition. On the surface of this false membrane there were great numbers of bacteria, but, among these bacteria, none could be recognized as causing the condition. (Witness makes further description in detail.)

(Witness further describes pathological examination of appendix spleen and pancreas.)

In the small intestine there was very little reaction. I did not have the portion of the stomach containing the ulcerations.

Q. With that feature before you, suppose that chemical analysis, chemical research, of the viscera discovered mercury in quantities, what would you say was the cause of death of the person whose viscera you examined?

A. Of course, this examination was amplified by slides which I later received from Major Mahon, and on the basis of this and the toxological examination, one would be justified in saying that the lesions were due to mercury.

I heard the testimony of Col. Vetter and Major Haw-
164 ley and assuming the conditions as they have pictured them, I would say her death was due to mercury. I also have the slides that I prepared of the tissue that I received, but the slides could not be used without a microscope. (Witness here points out the ulcerations as found in the big gut and other pathological findings made and of other organs and explained them in detail to the jury.)

I am curator of the Army Medical Museum, which acts as a central diagnostic laboratory in pathological matters for the entire army. All this kind of work comes to me from the

army. From the parts I got there and without the other history, it would be impossible to say what caused her death, although it is definitely suggested.

Cross Examination.

Q. Doctor, this tissue you have exhibited to the jury has undergone too much change, has it not, to be very helpful in arriving at a diagnosis?

A. If it is evident now, it would be more evident when it is fresh. It has not undergone too much change to be used in a matter of this sort.

Q. I think you stated from your analysis that you could not tell the cause of death or that it was mercurial poisoning.

A. I could not say positively, "It was mercury."

Q. In your opinion now, that it was mercurial poisoning, is it based on what you have been told by others and what you heard on the witness stand?

A. The conviction and suspicion?

Q. Yes, the conviction and suspicion.

A. Yes.

I did not hear Major Hawley when he stated that the death was not caused, or could not have been caused by a secondary infection and it could not have been, and this picture here was not caused by secondary infection.

Q. Look at the report and see whether it was the report you made.

A. It is a photostatic copy.

A. Did you say, in this report, and this is in your comment on the case: "The most striking feature is the colitis. This might well be the result of mercury. The cellular
165 reaction is not that of a bacillary dysentery, and there is too much necrosis for an ordinary ulcerative colitis. There is, of course, secondary infection".

A. There is bound to be in anything which caused a break in the mucous membrane of the intestine; the intestine is largely a hothouse for bacteria.

Q. "The picture in the kidney is not so specific. The tubular lesion, while definite, is hardly as severe as one would expect in an acute mercury poisoning, and there is no calcification of the tubules, as usually seen in the more chronic poisoning. The hepatitis is very likely secondary to the colitis. Mercury cannot be excluded as the cause of the picture, nor

does the evidence at hand definitely established it as the etiological factor."

A. I have already said that.

There was not enough damage to the kidney at the
166 time of death to cause suspension of urine. The damage to the liver is not particularly severe, it could be caused by bad liquor, but it is not the picture of an alcoholic liver.

Q. Could this condition be caused by drinking what we know as bad liquor?

A. It would not occur to me that it was due to alcohol.

Q. Do you know what is the recognized and proper method of making an autopsy?

Mr. Brewster: We object to that as not cross examination.

The Court: Sustained.

Mr. Kagey: He says he is a pathologist, and a pathologist, a competent pathologist ought to know how.

The Court: Ask your question, if you have one.

Mr. Kagey: I am asking it.

As to how an autopsy should be performed depends on the circumstances. I know Major Callender, he is a pathologist working in the Army Museum. About the only treatment that does much good in mercury poisoning is to remove as much mercury as possible at the time of the congestion, if that is delayed more than a matter of minutes and a certain amount of mercury is absorbed, nothing can save them. The amount of mercury absorbed is the answer, not how much is taken in the stomach. Mrs. Shepard apparently had an old chronic appendicitis. A lethal dose of mercury is about three grains, but it would be possible to take a tumbler full if you could get it out.

Q. From your explanation then, do you think it was possible the older ulcer in the stomach could have been a chronic ulcer?

A. Chronic in relation to the other lesions. I would not say what we know as a matter of chronic gastric ulcer, which is a matter of months or years.

Q. Would you say it was not?

A. It was not a chronic ulcer in that sense.

Q. Would you say it could not have been a gastric ulcer?

A. Any ulcer of the stomach could be called a gastric ulcer, gastric is just another name for the stomach.

Q. You are not positive from what you saw, that that older ulcer was an ulcer due to mercury, can you Doctor?

A. No, it may have existed for a matter of weeks, but it was not an old chronic thing.

Redirect Examination.

Q. Doctor, would it have been possible for the con-
167 dition of the appendix you saw to have anything to do with her death?

A. Why, no, that was just an incidental finding.

Putting mercury on the organs after death could not produce the condition in the organs we found there. You can not produce changes after death. The greatest peculiarity about mercury is that it does not seem to matter how the mercury enters the system, the pathology is practically the same. One may rub mercury on his skin and get lesions in the large intestine and to some extent in the stomach. Taking mercury into the mouth one might get the direct local effect. Another peculiar effect is the fact that it has sort of a cycle of excretion and absorption. If taken into the stomach it will be absorbed, circulated in the blood, excreted by the blood and kidneys. That which is excreted by the kidneys is lost; that excreted in the intestional tract is reabsorbed and regains entrance into the blood. In the case of arsenic you get an accute gastritis in the little bowel and in the little gut.

The primary action of mercury taken by mouth is the effect on the stomach where it is largely absorbed. The reason for the effect on the large intestine is because that is where it is eliminated.

Q. In other words, the ulceration you find in the gut is caused by the mercury being absorbed, and then throwed back into the big gut; is that right?

A. Yes, it catches it, coming and going.

That is a peculiarity of mercury. If a large dose of mercury is taken, a patient may die from its immediate reaction in the stomach, or the patient may live a few days and then dies from uremia, which is a loss of function in the kidneys. If the patient survives the anuric phase, the patient begins to recover. These dead cells are discharged, and new cells formed around the tubules, and regeneration takes place, then the patient may live eight or ten days, then die from a variety of things; either immediately from the primary shock

or a local effect of a large concentrated dose, and if that has not been sufficient to kill them, they may die in a few days from this kidney lesion; they may die later from kidney
168 involvement; they may die from exhaustion as a result of this intestinal condition and due to the continued circulation around the rest of the body perhaps some of the brain centers would be involved.

Q. After the mercury has gone into the blood or system, do you know of any cure for it if taken in a lethal dose?

A. That is the discouraging feature of mercury. They seem to be getting along and die in spite of the treatment. They die either from exhaustion as a result of this intestional condition and the hemorrhage that goes with it. If mercury is administered in several doses not enough to kill, one will get the accumulated effect.

Recross Examination.

Sometimes you get an irritation or sore mouth when mercury is used to treat syphilis and not prove fatal.

Redirect Examination.

I never heard of bichlorid of mercury being used as an external application, or for use for syphilis. Metallic mercury is non-toxic and is one of the oldest treatments for constipation. Bichlorid of mercury is a soluble salt and has a poisoning destructive effect. There are two forms of chlorid, the -ic and the -us. This is the -ic. Calomel is an insoluble salt, calomel is the -us form, and it is the bichlorid that is the deadly poison.

Recross Examination.

It is not possible to demonstrate the loss of function in organs or tissue because an organ may be intact but functionally inactive. I could not tell from an analysis of a poison case, whether mercury had been administered as mercurial iodid, or bichlorid.

Redirect Examination.

Metallic mercury has to be converted into a soluble form before it is poison. One might find a case or two in literature where one has died from mercury when rubbed through the skin.

Recross Examination.

169 I know Daniel J. McCarthy of the University of Pennsylvania and if he says five grain doses of blue pill, one every night, proved fatal, I would accept that as an authoritative statement, it would not make any difference how long. If you search the literature, you can find a death from any cause. If he says he himself saw a two-grain dose of calomel prove fatal, I would believe it. He himself is an authority, but I do not know that that is one of his cases. I have seen a number of text books in which the man has made some statement that is not true. I do not know of a text book on pathology that is written in English that tells a true story of dysentery.

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170 J. C. Gresser was called as witness on behalf of the Government having been first duly sworn testified as follows:

I am stationed at Ft. Riley, Kansas, am a non-commissioned officer, Staff Sergeant. I have been at the Post six years. There is a post office at the Post. Mail is delivered there by an ambulance driver. I am acquainted with Major Shepard. I remember the time of the death of his wife. It was June 15, 1929. I remember when Major Shepard returned to the Post after the death of his wife and I remember his taking sick. It was shortly after he came back to Ft. Riley. I do not remember the exact time he took sick, but I think it was around July 1, the same year his wife died. He was in bed in the hospital. While there he gave me a piece of paper with a message written out, saying he wanted me to go to the telegraph office and have a telegram sent to his niece, Miss Grace Brandon. That was less than a month after the death of his wife. He also requested me to go to the Post Office at Junction City and get his mail. It was not customary that I know of, for the officers of the Post to receive mail at Junction City. Up to that time I did not know the Major kept a box at Junction City. He drew the combination of his box on the back of a piece of paper. Government's Exhibit handed me is the paper handed me for the direction of the mail and the telegram to whom he said was his niece. Government's Exhibit 19 is in Major Shepard's handwriting.

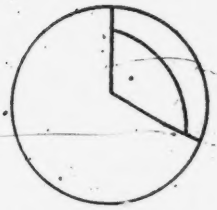
(Government's Exhibit 19 was marked, and received in evidence.) Exhibit 19 is in words and figures as follows to-wit:

Postmaster
Junction City

Please deliver to bearer mail from box 132 and oblige

C. A. Shepard

Get mail



Miss Grace Brandon, Brooks Field, Texas.

Have had to go to hospital will be unable to write
171 for a few days stop Send mail direct to hospital Fort Riley stop Don't worry for I will be alright Will wire if case becomes serious stop love

Charlie.

I made some blood counts, one time at the hospital Major Shepard asked me about a week or ten days after his wife was sick if I knew what was wrong with her from any examination made from the blood counts. I said only two things I could figure, she had a metallic blood poisoning or a bacterial infection. He said nothing. He walked off and made no reply. I made some urine tests. I do not know where it came from. Usually our specimens came from the laboratory of the hospital. I do not recall ever receiving any urine that purported to be that of Mrs. Shepard, that I got directly from Mrs. Shepard, or at the house. I got the blood for the blood tests and have a record of it. Prior to the time Mrs. Shepard was stricken on May 20, 1929, Major Shepard had me take a blood count. At that time Mrs. Shepard was up and around, sitting on the sofa when I took it. I took another count the next day at Major Shephard's request. The 17th and 18th when I took the blood counts, Mrs. Shepard was up and around. The record of the blood count is as follows: May 17, 1929, was the white cell count, which was 16,500 which contained 30% small mononuclears or lymphocytes, 1% large mononuclears, 69% polymorphonuclears, 2% basophiles, 1% esoinophiles. May 18, 1929, 4,600,000 red blood cells, 12,800 white blood cells, hemoglobin 85%. May 24, 1929, complete blood count taken. 4,500,000 red blood cells per cubic milli-

meter of blood. 15,200 white blood cells, hemoglobin 85%. May 27, 1929, white blood cell count only, which was 16,800. May 31, 1929, complete blood count showing 4,250,000 red blood cells, 19,600 white blood cells, hemoglobin 80%. June 1, 1929, partial count taken 3,940,000 red blood cells, 19,400 white blood cells, hemoglobin 70%. June 2, 1929, speci-

172 men of urine was brought to the laboratory. Examination showed normal excepting it was full of pus cells. June 3, 1929, complete blood count showing 4,400,000 red blood cells, 18,800 white blood cells, hemoglobin 80%. June 3, 1929, specimen of urine which showed chemical test and microsopic test negative all the way through. June 5, 1929, tested Mrs. Shepard's blood for type. She had type two. On June 5, same day, made complete red blood count, red blood cells, 3,750,000, white blood cells, 23,600, hemoglobin 70%. June 5, received specimen of feces which was tested for parasites and ova which was negative; it showed on the blood positive; microscopic test showed white blood cells and red blood cells. Same day, I took blood culture which was clear. That means ten c. c.'s were put in and incubated for 24, 48 and 72 hours and examined after that under miscrope to see if there was any bacteria in it. It was clear. June 6, 1929, complete blood test given, showing 3,500,000 red blood cells, hemoglobin 80%, white blood cells, 37,500. June 7, 1929, complete blood test showing 3,650,000 red blood cells, hemoglobin 85%, 32,000 white blood cells. June 7, 1929, specimen of urine received in laboratory. Chemically it was negative, microscopically it was full of pus cells. June 8, 1929, complete blood count showed red blood cells, 3,750,000, hemoglobin 85%. White blood cells 30,000. June 10, 1929, specimen of feces sent to laboratory, examined for parasites and ova which was negative. Test for blood was also negative. Only thing it contained was pus cells. June 13th, the day Mrs. Shepard was in the hospital, complete blood count showing 3,300,000 red blood cells, 61,500 white blood cells, hemoglobin 75%. June 14, 1929, before Mrs. Shepard left hospital blood test was taken which showed 3,250,000 red blood cells, 54,200 white blood cells, hemoglobin 70%. One June 15, the day she died, a complete blood test was taken in the morning showing 3,200,000 red blood cells, 45,000 white blood cells, hemoglobin 70%.

I have charge of the morgue. About three days

173 before the death of Mrs. Shepard, I had a conversation with Major Shepard at the hospital. Major Shepard

said, Under no conditions did he want a post mortem done on his wife; he said it was her last request, that she did not want it, and he was going to see that she did not have any.

Cross Examination.

I did not make a cross-type of the blood at the time of the transfusion. I took specimens of her urine three or four times during the whole course of her illness. We tested it for reaction, specific gravity, albumin, sugar and microscopically for casts and red blood cells and white blood cells. Most of the report went to Major Hawley, some to Major DuFreene, and several times I showed them to Major Shepard.

Redirect Examination.

I did not personally get the urine. All the specimens I ever got personally were blood specimens. All others were sent to the laboratory.

Clara Brown, called as a witness on behalf of the Government, having first been duly sworn, testified as follows:

Direct Examination.

My name is Clara Brown, I am a nurse, registered under the laws of the State of Kansas, and a graduate from a hospital in Larned, Kansas.

I received a call to go to Junction City about May 20 to attend Mrs. Shepard. Major Shepard met me at the station. At that time he said his wife was suffering from a nervous break-down. About 15 minutes after I arrived at his quarters he said it would not be necessary to keep a record on this case. I never delivered any specimens of urine to Sergeant Gresser. I asked Major Shepard once after I had been there awhile if I should do that and he said, "No; I am looking after this." He took the urine to the hospital himself, and I prepared it and gave it to him. He gave me no reason for taking it to the hospital himself. When I arrived, Mrs.
Shepard's condition was, she was in bed, very ill, and
174 delirious and had been vomiting. The next day she
seemed better. For a few days she got better. With reference to her mental condition, she gradually cleared up. It was just a fw days before it apparently cleared up. Her eyes were dilated. They apparently cleared up. Then there

was another back-set as to her eyes. I do not think they ever cleared up the second time. Her condition mentally was as intelligent as anyone while I was there. I have been a trained nurse since 1920. I gave Mrs. Shepard her bath. Her personal appearance was very good. I did not notice any redness of the capillaries. There was nothing indicated to me that she was a habitual user of liquor and nothing to indicate she had abused her body at all. She had a smooth, white skin, and that was true of her face. During all the time I was there, Mrs. Shepard never asked for any intoxicating liquor. (Objection to last statement sustained.) I could not get her to take liquor; she flatly refused most of the time, more than she did take it. I never, while there, saw Mrs. Shepard drink any intoxicating liquors for beverage purposes. Major Shepard gave me all the medicines and I do not think any instruction was given me about giving anything to her in the way of medicine that came from others. Major Shepard made capsules while I was there and ordered me to give them. He prepared the capsules himself in the kitchen. I was with Mrs. Shepard when he prepared them. I do not know of my own knowledge what was in these capsules. He told me it was sodium bicarbonate and luminol. I never saw him put the soda into the powder. Luminol is a white tablet for relieving pain. Aside from luminol and sodium, Major Shepard gave his wife a quarter of morphine once. That was right after the hemorrhage. Mrs. Shepard had some company while she was sick, and I remember one day Mrs. Strickler coming there. After this mental condition cleared up, Mrs. Shepard was very intelligent. I carried on conversations with her and neighbors came in and I heard her talking with them.

175 During those times her conversation was perfectly all right. I cannot state definitely how long I was there before the first hemorrhage occurred. It was severe. Prior to the time of the hemorrhage she had a severe pain in the abdomen, how long before the hemorrhage came, I do not know. A couple of days after that hemorrhage she had another. From that time on she went down. She retained her mental faculties up to near the last. She talked intelligently up to a couple of days before her death. She was very intelligent. All capsules given her were prepared by Major Shepard. I do not know of a single capsule prepared by Major Hawley. There is a hospital at the post. I do not know

if Major Shepard was a physician at the post of my own knowledge. She took a number of capsules of sodium and luminol. I do not believe she had any the first week. The feces were dark liquid. She had a hemorrhage and then it was almost blood in the stools. They continued up until the time of her death. Major Shepard took the specimens to the hospital. I do not know of anything going to the hospital for examination for Mrs. Shepard that left the room in the hands of anybody but Major Shepard. My experience with poisons has been only thru study. The things I saw about Mrs. Shepard that attracted my attention was, the first thing was collapse, soreness of the mouth and jaws, and severe pains in the abdomen. Next, hemorrhage and vomiting. The pupils of the eyes were dilated. While I was there, Major Shepard never mentioned anything about his wife's drinking to me.

Cross Examination.

I gave her liquor, that is, all I could get her to take. I saw her brother give her liquor. It is not usually the custom for me when nursing on a case to take specimens of urine to a laboratory when nursing private cases in the home. Nothing was said about the practice for the laboratory sergeant to go out and deliver specimens of urine of patients. I was present once during Mrs. Shepard's illness when blood tests were made. I know a large number of blood tests were taken. I was present at the transfusion. Sergeant
176 Gresser obtained blood for a count. Mrs. Shepard was a sick woman just before she obtained the blood transfusion. Her temperature and pulse during her illness were practically normal. The temperature and pulse usually come up in the afternoon. I had the afternoons off. I was present when Major Rose was treating Mrs. Shepard's mouth. I noticed the bottle containing the solution. Major Rose used and I also saw the poison sign on the bottle. I do not recall being present when Major Rose told Mrs. Shepard that she should be careful how she used the mouth wash. (Witness here identifies the arrangement of rooms and furniture in the Shepard apartment as shown on map.) I did not say or testify that Mrs. Shepard was nervous. Mrs. Shepard was very ill and delirious. She talked in her delirium and I think she picked things out of the air, and her vision was blurred. She complained of disturbance of her vision. I did

not say she had any redness of the capillaries. I said I did not observe any. Major Shepard told me he prepared medicine in capsules and told me what was in them.

Q. And gave them to you?

A. Yes.

Q. And you had those in your possession?

A. He gave me one at a time to give her.

Q. You gave them?

A. Yes, per orders.

Mrs. Shepard was in the bedroom when she had her first hemorrhage. Up to that time she had been able to go to the toilet, she insisted on it; she should not have. I gave Mrs. Shepard the mouth wash personally. Major Rose swabbed her throat when he came. He had charge of that part of the case. I do not know how many times Major Hawley or Major Rose were there. There were so many coming in and going out. After the McCoskeys' came, Major Shepard moved out onto the porch. I did not take near all of the afternoons off. I do not know how many. I took one off whenever it was so I could. Part of the time Major
177 Shepard stayed with her and part of the time some of her friends stayed with her while I was gone. Dr. O'Donnel came to see Mrs. Shepard once. At her death, a Captain Johnson, a doctor, was there. That was the only time I saw him.

Redirect Examination.

I am sure Mrs. Shepard did not swallow any of the mouth wash. She did not use half the bottle. She refused. Then she used Lavoris. A bottle of Lavoris was sent down from the hospital. Mrs. Shepard did not use the mouth wash because of the taste. I do not know how the mouth wash was made up. Peroxide was to follow the mouth wash.

E. C. Sawtell was called as a witness on behalf of the Government, and testified as follows:

My name is E. C. Sawtell. I live at Junction City, Kansas. My business is undertaker. I had charge of the body of Mrs. Shepard. When I went to get the body, and before I got down to the Undertaking Establishment, I had a conversation with Major Shepard. I asked Major Shepard if I should take the body to the Funeral Home and he said, yes; and he

said, "Under no circumstances allow a post mortem," without his consent, and I told him I would not. The casket was purchased the morning following her death.

Q. That would be the morning of the 16th. At that time, did you have any conversation with him about the casket?

Mr. Kagey: Just a moment. We object to that as certainly not material in this case, and certainly not within the issues; incompetent and irrelevant.

The Court: I do not know; it is a conversation with the defendant.

Mr. Kagey: I understand it is—not about any matter in this case.

The Court: I am assuming the district attorney is asking entirely in good faith.

Mr. Brewster: I am asking in good faith.

178 Mr. Kagey: Save our exception.

Mr. Brewster: Q. Was there any statement made at that time when he got the casket, as to what he was going to do with the body?

A. The body was to be taken to Los Angeles.

Q. State what was to be done with it.

A. They were planning on cremation.

Mr. Brewster: That is all.

Cross Examination.

I stated in my examination in chief, that Major Shepard said there was to be no autopsy unless he authorized it. He did authorize it by calling me after the body was received. I did not see Major Hawley in the meantime. My man and myself went to the quarters after the body, and before we had returned, someone had called in and asked for a post mortem, and I told them in the office that Major Shepard requested no post mortem. That that was the wish of Mrs. Shepard, and that I was going to carry out his wishes until I had heard definitely from Major Shepard.

Redirect Examination.

I had no controversy with Major Hawley about an autopsy, before or after the autopsy to my knowledge.

Recross Examination.

If the heart is removed it is very difficult to embalm, but it can be embalmed. I told Major Hawley not to take out

the heart on that account. I did not tell him not to take out the lungs. Any circulation that is destroyed makes it more difficult to embalm.

Q. Even if it is a little difficult, cannot the body be just as well preserved if all organs are taken out?

Mr. Brewster: We object to that. It is just asking about a conversation tending to impeach Hawley. All I asked him, what he said to Major Shepard.

Mr. Kagey: We cannot call him as our witness; what is the use of keeping him here? I will call him as my witness.

The Court: All right, he will be a witness for the defense.

Mr. Kagey: Read him the question.

(Last question read as above recorded.)

Mr. Kagey: Q. You can preserve the body just as well if all the organs are taken out?

A. Yes, sir.

Q. It will simply mean a little more work for you, will it not?

A. Yes, sir.

Redirect Examination.

I told Major Hawley that I preferred he not take
179 out the heart. It was stated then as soon as they found the cause of death, they would quit. They did not say that they found it, nor give me any reason for quitting, they completed their post as far as I know.

Mr. Kagey: Q. Major Hawley is not correct, if he said you said not to take out the heart and lungs?

A. Every organ in the body can be taken out.

Q. There was not anything said about taking out the lungs?

A. I do not recall.

Mr. Brewster: Q. You do not recall whether it was discussed?

A. No, sir, I do not.

Mr. Brewster: That is all. You may be excused.

Kathryn McCoskey called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

My name is Kathryn McCoskey. I live in Los Angeles, California, and have since 1915. I was present at the time of the death of my sister-in-law and thru part of her sickness. I arrived on June 11, 1929. Mrs. Shepard died June

15, 1929. Prior to her death I had a talk with Major Shepard in reference to some letter to be written. To the best of my knowledge and belief, it was the morning of June 12. That same day he prepared a letter for me to sign. In my original conversation with Major Shepard, I was to write an original letter to General Moseley. He wanted me to use my friendship for Gen. Moseley to get a transfer for him to the Air Corps. He said no particular station. In the afternoon after the conversation, he came to me with a letter. Prior to that time, he had told me Mrs. Shepard was not going to get well. He told me that he did not think the blood transfusion would do any good. She was going to die anyway. At the time this letter was written I had never heard of one Grace Brandon. I had heard of Brooks Field. Government Exhibit 20 handed me I received from Major Shepard June 12. I did not write the letter as he suggested. When he handed me Exhibit 20 he told me to copy it. Government's Exhibit 20 is in Major Shepard's handwriting.

(Government's Exhibit 20 marked and received in
180 evidence.)

Government's Exhibit 20.

"Major C. A. Shepard, brother-in-law, graduated from the school of aviation medicine Dec., 1928, but owing to the shortage in the medical personnel, it has been stated that no more flight surgeons will be assigned to the flying fields until there is an increase as contemplated in the bill now before Congress, to be acted upon in Dec. or unless someone now assigned as a flight surgeon reverts back to the general professional work. However, the same shortage exists among the flight surgeons as in other branches, and necessity at times requires an assignment.

"Major Shepard has a record in the Medical Dept. as a capable internist and is also on record as possessing the personality necessary in the making of a good flight surgeon, and as he has expressed a preference for such work, I believe he would be of valuable aid, not only to the air corps, but also to the Medical Dept. if selected for an assignment, when these dual capabilities could be used to advantage. I have in mind such a station as the school of aviation medicine, Brooks Field, Tex.

"Believe a letter to General Ireland personally would have a good deal of weight—having Major Shepard assigned at the first opportunity.

"You may state that your letter is written without the knowledge or instigation of Major Shepard and that these facts have come to you thru friends who have heard Major Shepard express himself."

At that time I only knew that Major Shepard had been down to Brooks Field and taken a flying course. Above letter was written just three days before the death of his wife. I went down to Junction City with Major Shepard to get the casket. When on the way to select the casket for his wife, he asked me if I had copied and sent it, the letter. That letter was to go to Gen. Moseley. I had only been there one day when he requested me to write the letter. I do not know whether Gen. Moseley and Gen. Ireland were great friends. When I got there on the 11th Major Shepard told me that excessive alcoholism caused his wife's sickness. He said while he had been gone that she had been going to parties and drinking more heavily than she had been before. but I do not know it was that morning he said that. The evening after Mrs. Shepard passed on, I had a conversation with Major Shepard at dinner in Manhattan. He said that they had been out to dinner previously and had had a conversation in which Mrs. Shepard said she knew she was going to die, and she wished him to marry again. That is what he said to me. He said to me he never would marry again.

After Mrs. Shepard died he appeared to be very grief
181 stricken. He said at that time that he had nothing to live for and wished he were dead instead of his wife. He cried quite frequently. On our way to Los Angeles. I invited him to our house. He did not accept the invitation at first. He said he would stay at a hotel, that he preferred to. I was present when there was a conversation with Major Shepard about an autopsy after the death. Major Hawley came there after the death and said that Col. Grissinger had sent him and he desired an autopsy to be made. and Major Shepard said that he would not give his permission at that time; that Mrs. Shepard had not wished to be cut up and it was her last wish and he was not going to allow her to be cut up. Half an hour later Col. Symonds and Col. Grissinger came there. I believe they stated it would be necessary for a death certificate to be issued; that there

would have to be an autopsy; and I believe it was stated that that was orders; that there would have to be an autopsy. Major Shepard said that was taking it over his head, if I remember correctly. Up to that time Major Shepard had not consented to this autopsy, to my knowledge. After these officers left, Major Shepard was very much upset at the autopsy being taken. I had a conversation with Major Shepard about writing to a Congressman or Senator.

Mr. Brewster: Q. What was that conversation?

A. The conversation was that he thought that the general was going over his authority in ordering an autopsy; that Mrs. Shepard was a civilian, and not under Army jurisdiction, and that he would like to have her brothers, Curtis and Ted McCoskey look up the law on the matter and write to—I do not know who it was, some senator or representative in Washington, and complain about the autopsy being conducted.

When I came there I was with Mrs. Shepard practically all the time; I was with her when the nurse was off, when Major Shepard was out. I never did hear her in Major Shepard's presence say anything about an autopsy, not wanting one. When I got there, Mrs. Shepard knew me perfectly. Mrs. Shepard knew me up to the day before her death and was perfectly rational. After the transfusion she made one remark. She made a remark to all of us that she felt better, she wanted to sleep, for all of us to get out of the room, which we did, and she went to sleep.

My husband and I were lying down, Shepard was
182 lying down, he came to the door and told us to come quick, she was having a relapse and was dying. We ran into the room, and he had been to the telephone and called the hospital. Anyway, he stood in the doorway, crying in the doorway of her bedroom, and I said, "Doctor, why do you not get somebody? Do not let her go out like that." He said he phoned the hospital, and no one was there at the time. I said, "You must do something" and I went to the telephone and telephoned the hospital and the doctor said, Major Shepard said that he believed that Major Hawley was playing golf, and my husband ran across the golf links to get Major Hawley, and I phoned the hospital and had the operator there locate Captain Johnson and Major DuFrenne, and I also telephoned the nursing home for the hospital, and had Nurse Brown called; she had gone home for her two-hour rest period.

Cross Examination.

I have known Major Shepard since the last part of 1927. I first met the Major in Omaha, while on our wedding trip. I got acquainted with Mrs. Shepard at that time. We were there 7 or 8 days and our stay was pleasant and our relations cordial. I did not see Major or Mrs. Shepard since that time until I was called to attend the last illness of Mrs. Shepard. My husband preceded me one week. I was summoned by telegram, and that was the purpose of my visit to Ft. Riley. I arrived at Ft. Riley at 4:00 o'clock in the morning of June 11. I was met by Major Shepard and Mr McCoskey, and Major Shepard told me she was not going to get well. My husband and I stopped at the Major's quarters at the post. I saw Mrs. Shepard when I arrived at the home. I talked with her at that time. I did not realize quite how serious condition she was in, then I became more impressed as I stayed there. The only time I saw her out of bed was when she was taken to the hospital. I met Major Strickler and Major DuFrenne at Major Shepard's home. Major DuFrenne performed the transfusion. I do not remember how many times I saw Major Hawley there. I understood he was called in his professional capacity. Mrs. Shepard was at the hospital about a day and a half, and in my opinion she was a little weaker when she returned. I did not
183 see the transfusion. It was around 1:30 or 2:00 o'clock.

It was around 4:00 or 4:30 that the Major said she was in a critical condition. I was in my bedroom. He said he tried to get the hospital. He did not ask me to get Major Hawley. I tried to get Major Hawley. My husband endeavored to get Major Hawley. Major Hawley arrived about 15 or 20 minutes before she died. There were several officers present when she died. Major DuFrenne, Captain Johnson were there. When I arrived at Ft. Riley, Major Shepard told me about Mrs. Shepard was suffering from excess alcoholism. Sometime during my stay there, he told me while he was away in Texas she had been going to parties and had been drinking more heavily than ever before. I went with Major Shepard to select the casket at Junction City the day following Mrs. Shepard's death. That was on June 16, I believe. He consulted my husband with respect to the funeral arrangements more than myself. It was a family affair. I, my husband, and Major Shepard, attended the funeral of Mrs. Shep-

ard. I accompanied the remains to Los Angeles. I believe Major Shepard wired or wrote to my brother-in-law, Curtis McCoskey to have the grave opened at Engleside or Englewood. It was my understanding that there was to be an interment at Los Angeles. I think the substance of the wire was to suspend final arrangements until we arrived. I did not participate in the family conferences with respect to the disposition of the remains. I attended the services held in Los Angeles, but was not present at the time of the cremation. There was a family conference held here in the matter of cremation. Going back to the day after the funeral, I said the Major and I had dinner at Manhattan, Kansas. My husband was along. In that conversation, I said Major Shepard had said that his wife, Mrs. Shepard, had told him that she knew she was going to die and she wished him to marry again. At that time the Major appeared to be still very much distressed and grief stricken. He was in tears a greater part of the time. That was the day after
184 the death and before the funeral. In Los Angeles we invited him to stay at our home. I do not think he said anything about imposing upon us. I was surprised when he said he would better go to a hotel. He did go out and stay one night with us. I think he stayed two nights with Curtis. He stayed the first night at the hotel. I know Major Rose. After the death of Mrs. Shepard Major Hawley came over and stated in substance that Col. Grissinger had sent him over, he was under orders from Col. Grissinger to obtain permission for an autopsy to be performed on the body of Mrs. Shepard. That was about half an hour after Mrs. Shepard passed on. In response to that, Major Shepard said, no; he would not give his consent, and he did not wish an autopsy performed on Mrs. Shepard as it was against her wishes. That was the only reason I heard that he assigned. Major Hawley said that he would take that reply back to Col. Grissinger. Later Gen. Symonds and Col. Grissinger came over and I overheard their conversation with Major Shepard. I do not think he said anything about Mrs. Shepard at that time.

Q. Did he not say, in substance, "Very well, but you are making me break my promise to my wife"?

A. I do not think he said exactly that.

I heard all the conversation about that matter. Gen. Mose-

ley is a friend of mine. I had known him for about 6 years, I believe. Major Shepard and I did not discuss the desirability of the Major getting into the Air service. He did not tell me there was a 50% increase in pay. He said he would like to transfer Mrs. Shepard from Ft. Riley. I believe he mentioned being anxious to get into the Air service. That was the occasion of his suggesting I write this letter to Gen. Moseley. In a general way I had some conversation about Major Shepard getting into the Air service, but not before he gave me that letter to copy. We were on such friendly terms that I was willing to aid him in any way that I could.

Redirect Examination.

The Major seemed to be more or less grief stricken
185 over the sickness and death of his wife.

J. W. Ross was called as witness on behalf of the Government, having been first duly sworn, testified as follows:

I am Manager of the Western Union at Topeka, and I have the original telegrams in my possession signed by Major Shepard and they are herewith produced.

Kathryn McCoskey recalled as witness on behalf of the Government, having been previously sworn, testified as follows:

Government's Exhibit 21 handed me is a telegram in the handwriting of Major Shepard. (Government's Exhibit 21, marked, offered and received in evidence.) Exhibit 21 is as follows:

"Junction City, Kansas, March 29, 1929.

To Hauser Floral Company
St. and No. 109 North Alamo St.
Place San Antonio, Texas

Deliver Saturday afternoon to Miss Grace Brandon twenty-six hundred and four south Presa street San Antonio one easter lily plant having four blossoms enclosing card in sealed envelope with words easter greetings signing my name send statement to me care station hospital Fort Riley, Kansas.

Major C. A. Shepard."

I am handed paper marked Government's Exhibit 22. I think that is in Major Shepard's handwriting. It is dated

June 29, 1929. We left with the body for Los Angeles June 19, on Wednesday, and arrived Friday, the 21st. The funeral was on the 23d, I think. Government's Exhibit 22 offered and received in evidence without objection and is as follows:

"1929 June 29, P. M. 5:00, Waco, Texas.

To Miss Grace Brandon
St. and No. 2604 South Presa St
Place San Antonio, Texas

Will phone on arrival at hotel probably about ten must see you tonight love

Charlie"

To my knowledge Major Shepard had not seen Grace Brandon between the date of the death of his wife and the time he got out to Los Angeles. The first night we arrived in Los Angeles, he stayed at the hotel. This telegram of June 29 is dated at Waco, Texas. The burial after we got to
186 Los Angeles had not been held on June 21. She was still in the casket. Government's Exhibit 23 marked, offered and received in evidence without objection. Exhibit 23 is as follows:

"Night Letter Los Angeles, California, 10:10 P M
June 21, 1929

To Grace Brandon
St. and No., Ground School
Place Brooks Field, Texas:

Both wires received stop see letter written today stop Surgeon General will be here Monday if I can see him will save trip to Washington stop will leave here anyway Tuesday evening.

Charlie."

I think that is 10 o'clock of the night we got there with the body. We got there during the day. (Mr. Brewster calls attention of jurors to Exhibit 23 sent at 10:10 p. m. of the night of June 21.)

Mrs. Byron Dawson, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

I live in Trenton, Oklahoma. In 1928, and until April, 1929, I lived in Junction City, Kansas. I am a step daughter of Mr. Scott. Mr. Scott is in the jewelry business. I did not know Major Shepard until he came in the store. The first time I saw him in the store was December 16 or 17, 1928. I do not think he bought anything the first time he came in.

He came in and wanted to look at toilet sets and I believe I showed them. He looked at them and then went out. Either that same day or the next day he came back. He purchased a toilet set at that time. We have a record of the sale. He paid $25.00 for the toilet set. Comb, brush, and powder box— It was made of pyralin amber. He bought it and told me to wrap it carefully so he could ship it thru the mails. While I was wrapping I saw him looking in the show-case and I asked him if there was anything else I could show him. There were rings in there and I showed them, the rings. I told him about the ring, I tried to show him the ring, but he said he could not take the ring because he did not know
187 the size. I did not want him to go out without selling it; I told him I could arrange that, we had a little card to stick the finger thru to get the size and I could give him a card. It was December 17, 1928, I sold the toilet set. A piece got broken in the toilet set. Attention was called to it by Major Shepard, but he did not come to me. He went to my father, and I was present. I know he came in and said it was broken. I cannot say how long that was after I sold him the set before he came back.

Q. Now, going back to this ring business, you gave him some of these cards?

A. Yes, sir.

Q. Tell me what those cards are.

A. Just little cards, about this big (indicating), paper or pasteboard, for seven sizes or so, that you put your finger thru to get the size to fit your finger, and that tells the size of the ring, and make them any size.

I laid a ring back for Major Shepard so it would be there when he came in. The record of that sale is in the book in my father's handwriting. I laid the ring aside for Major Shepard the same night he bought the toilet set. I wrote his name on it and put it in a drawer so if he did come in it would be there.

Cross Examination by Mr. Kagey.

Q. What was the price of that ring?

A. Ten dollars.

Mr. Kagey: The defendant admits he got the ring, and that the price of it was $10, and that it was sent to Miss Brandon.

Mr. Brewster: We prefer to prove it by witnesses. Coun-

sel may not make this look little, by admitting it. We have a right to present our case.

Mr. Kagey: We have a right to offer to save time.

Mr. Brewster: We have a right to prove it.

John Taylor called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

My name is John Taylor. I reside in Omaha, Nebraska. I am associated with my father-in-law in the bird business. I do not know Major Shepard and have never seen him. I have orders purporting to come from him and will produce them. Government's Exhibit 24 is an order I received. We did not have the cage Major Shepard ordered (it is here admitted that Government's Exhibit 24 is in Major Shepard's handwriting). Government's exhibit marked, offered and received in evidence and is as follows:

May 8, 1929.

188 "Max Geisler Bird Co., Omaha, Nebraska.

Dear Sir: Please ship by express prepaid the following to Miss Grace Brandon, 2204 South Presa St., San Antonio, Texas:

One living musicbox, choice selected singer	$12.00
One birdcage #211a (page 21 catalog)	4.00
One carton roller seed	.35
One carton egg biscuit	.23
Three cartons bird grit	.30
Express charges	.98
	$17.86

Enclosed find p. o. order for $15.00 and cheque for $2.86. Please send a yellow canary with just a little black. If this amount is not sufficient to cover express let me know and will remit balance.

Yours truly

C. Shepard

Box 132

Junction City, Kans.

May, 1929 received Max Geisler Bird Co. Omaha P. O. 15.00, ck. 2.86, 17.86."

We did not send it at first. There was difficulty in filling the order for the cage. We finally sent it, and this is an

acknowledgment of the order and stating we did not have the number of cage and this is the reply:

"Max Geisler Bird Co.

Omaha, Nebr., May 10, 1929.

May 13, 1929. Received Max Geisler Bird Co., Omaha.

Mr. C. Shepard, Box 132, Junction City, Kansas.

Dear Sir: We acknowledge receipt of your order and have booked same for shipment, as per the enclosed invoice, but we have not forwarded the order because we are out of the style cage ordered, but we have another style quite similar and which we think you will like just as well as our number 215 listed at $3.00, or number 213B at $4.00, both are very good numbers. We will hold your order until your instructions are received.

Very truly yours,

Max Geisler Bird Co.

G.O. (Signed) Max Geisler, Jr., Manager.

P. S. There would be an additional charge of 70c for prepaying the express charges on the cage.

M. G. Co. Enclosed find M. O. for expressage on cage 213B.

C. Shepard."

Government's Exhibit 25 (above) was marked, offered and received in evidence.

Mr. Brewster: Q. I will ask you, if upon receipt of
189 that, if you wrote a letter to Major Shepard, or Mr. C. A. Shepard?

A. On receipt of this?

Q. No, on receipt of the letter I have just read in evidence?

A. This, here, was receipt of his order.

Q. Did you write a letter to him?

A. Yes, this is the letter we wrote to him.

Q. Did you get a reply on the same letter?

A. Yes, sir.

Mr. Brewster: We now offer in evidence the letter, marked Government's Exhibit 25, and I desire to put in the record that it is admitted that the handwriting below is the post-script in the handwriting of Mr. C. A. Shepard. We offer it in evidence.

Mr. Kagey: We will admit it was sent to Miss Brandon, and she received it.

Mr. Brewster: Miss Brandon will testify to the fact about that.

Mr. Kagey: I want to save time.

Mr. Brewster: Miss Brandon is a witness here, and I will probably have to use her.

Mr. Kagey: It would save questioning this witness any further. I do not care anything about if, of course, and you may put Miss Brandon on the stand if you wish.

Mr. Brewster: I want to offer my own evidence.

At the time these letters were received, I did not know they were coming from an army officer. We shipped the order to Miss Brandon. It was not delivered right away because of the address being mixed up, but it was delivered.

Theodore H. McCoskey, was called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

My name is Theodore H. McCoskey. I reside in Los Angeles, California, and Mrs. Chas. A. Shepard, or Zenana Shepard was my sister. Mrs. Shepard was 37 years old when she died. I came to Ft. Riley on the occasion of her last illness and arrived early on the morning of June 4, Tuesday morning. Major Shepard met me at the traim. I asked about the condition and he said she had been having hemorrhages and that she was very sick. When I arrived at my sister's house she was able to recognize me all right. At the time I arrived, she stated at that time, "O, Doctor, can you not give me something? I feel as though I were going to pass out," were her exact words. I believe Major Shepard mixed a little ammonia in half a glass of water and gave it to her. My sister was not able to eat much while I was there. On one occasion Major Shepard was attempting to feed her some
custard. As I came into the room, Major Shepard was
190 standing on the far side of the bed, and had a tray,
and I believe there was some custard of some sort, and he had not been very successful in getting her to eat any of it, and I believe it was Mrs. McCoskey who asked me to step into the room and see if I could get her to eat some of it. The doctor, Major Shepard, sort of shoved the tray at me and seemed a little up-set about it. He said, "Here, you make her eat some of it." I took the tray to the kitchen

and later on came back and she had half dozen teaspoons full of something of that nature.

Q. You considered that pretty good success, as to what you had been able to get her to eat?

A. I certainly did.

Mr. Kagey: Wait a moment; we object to that question.

The Court: Oh, it may stand.

Mr. Kagey: Exception.

I recall the evening of the death of my sister. I recall her having a sinking spell, and I went for Major Hawley out on the golf links. After my sister's death, Major Shepard seemed very much upset and his grief was intense for awhile. He came back into the room perhaps 20 minutes after my sister had passed on, and he seemed to have recovered enough to make a certain amount of observation. Major Shepard accompanied us with my sister's body to California. His grief continued on the trip to California. His appetite on the way seemed to me quite normal.

Cross Examination.

I was subpoened by the Government, and have been here about a week or ten days now. I talked with Mr. Caffrey about this case in my own home in Los Angeles.

Curtis McCoskey called as a witness on behalf of the Government, having first been duly sworn, testified as follows:

My name is Curtis McCoskey. I reside in Los Angeles, California. Zenana, Major Shepard's wife was my sister. I recall the occasion of the death of my sister. After the arrival of Major Shepard, my brother and sister-in-law, in California, I had a conversation with Major Shepard the first day that he arrived about a transfer to San Antonio, Texas.

191 It was held in the hotel room or during that day, I cannot say just where it was. He stated he would be obliged to leave the following day after the funeral to go to Washington as his leave was short and he particularly wanted to see General Ireland in Washington regarding a transfer to San Antonio; I believe he said Brooks Field, or at least he said, San Antonio, Texas. Government's Exhibit 26 handed me is a communication I received sometime in April of this year from Major Shepard and it is in Major Shepard's handwriting. It is post-marked April 13.

Frank H. Hauser called as a witness on behalf of the Government, having first been duly sworn testified as follows:

My name is Frank H. Hauser. I reside in San Antonio, Texas, and am in the florist business and have been in that business 58 years. During that time I have transacted business with Chas. A. Shepard. (Government's Exhibits 27 and 28 identified as communications from Major Shepard and admitted in evidence without objection.)

Exhibit 28 is as follows:

"The Cavalry School, Station Hospital.
Fort Riley, Kansas, May 23, 1929.

"Hauser Floral Co., No. Alamo, San Antonio.

"Dear Sir: Please deliver to Miss Grace Brandon, 2604 So. Presa, San Antonio, Thursday, May 30, in the morning, one dozen peonies, assorted colors, attaching the enclosed envelope. Mail statement to me here, address above.

Yours truly,

C. A. SHEPARD."

I do not recall ever having had any dispute with Major Shepard about the kind of flowers I sent out with reference to that order. Government's Exhibit 29, handed me is a communication I received from Chas. A. Shepard. I think I received it about March, 1930.

Government's Exhibit 29 marked and received in
192 evidence without objection. It is as follows:

"Box 278, Fitzsimmons General Hospital,
Denver, Colo.

"Hauser Floral Co., 109 No. Alamo, San Antonio, Tex.

"Gentlemen: I am still awaiting a reply to my letter of ten days ago, asking why my order for flowers for Miss Brandon was not filled according to my orders for date of Feb. 23d; also asked if order for Easter, April 20th, was understood. Have heard nothing from you.

"If you have any objection to filling these weekly orders, please let me know, returning all cards left with you, with statement to date. I will forward a check, and have some other firm look after them.

Yours truly,

C. A. SHEPARD, Major, M. C."

Government's Exhibit 30, is a wire received from Chas. A. Shepard. (Government's Exhibit 30 marked and received in evidence is as follows;

"Received at Corner Commerce & Presa Sts., San Antonio, Tex. ,1929 Mar. 29 P. M. 3 51

"NSA367 44 DL - Junction City Kansas 29 3 10 P.

"Hauser Floral Company, 109 North Alamo St., San Antonio, Tex.

"Deliver Saturday afternoon to Miss Grace Brandon twenty six hundred and four south Presa street San Antonio one easter lily plant having four blossoms enclosing card in sealed envelope with words easter greetings signing my name send statement to me care station hospital Fort Riley Kansas

MAJOR C. A. SHEPARD."

Government's Exhibit 31 admitted in evidence, it being an account of Major Shepard at the Hauser Floral Company as follows:

"Major C. A. Shepard, Station Hospl. Ft. Riley, Kansas.
1929
Mar. 30 Lily, Brandon—2.50 Apr. 10 by Ch. 2.50
May 30 Dz. Gladiolas, Brandon—3.50 Jun. 6 by ch. 3.00
Nov. 10 Roses—1.50
17 Roses 1.50 Nov. 24 roses 1.50—3.00 Dec. 7 by ch. 4.50
Dec. 11 roses 1.50 Dec. 8 roses 1.50—3.00
15 roses 1.50 Dec. 22, roses 1.50—3.00
25 roses 6.00 Dec. 28 roses 2.00—8.00 Jan 10 by ch. 14.00
Jan. 5 roses 2.00 Jan. 1 roses 2.00—4.00
12 roses Brandon 2.00—2.00
19 roses Brandon 2.00
26 roses Brandon 2.00—4.00 Feb. 7 by ch. 10.00
Feb. 10 roses 2.00 Feb. 9 Brandon roses 2.00—4.00
23 roses Brandon 2.00 roses Brandon 2.00—4.00
1 roses Brandon 2.00—
9 roses Brandon 2.00—4.00
16 roses Brandon 2.00—Apr. 2 by ch. 8.00
23 roses Brandon 2.00—4.00
Mar. 2 roses Brandon 2.00—
193 9 roses Brandon 2.00—4.00
16 roses Brandon 2.00—

23 roses Brandon 2.00—4.00
31 roses Brandon 2.00—2.00
Apr. 7 roses 2.00—

Mr. Wyman: Q. I hand you herewith government's exhibit 32, consisting of four pages, and ask you what they are, and where you received them?

A. I received these thru the mail, with an order for flowers, to go each date these cards marked on, the dates in the corner. Those were the standing orders, and one of these cards was to be placed in each date, for whatever date that was.

Q. Was it the custom of Major Shepard for each basket of flowers he had you send out to Miss Brandon, to always furnish a card to go with those flowers?

A. Yes, sir.

Q. That is what those are?

A. Those are the cards that were not delivered.

Q. Those are the ones that were not delivered, you say?

A. Not delivered.

Mr. Class: As I understand it, this ledger sheet, which is offered and received, covers two items of flowers sent to Miss Brandon by the Major in 1930, long after the death of Zenana Shepard. I also understand that these exhibits, which counsel is now submitting, are the cards that went with these flowers in 1930, long after the death of Mrs. Shepard. We make the general objection that it is immaterial, and does not tend to prove or disprove any issue in this case, and for the further reason that, in our opening statement, we disclosed fully and fairly and truthfully the relations between Major Shepard and Miss Brandon, particularly during the year of 1930.

Mr. Brewster: These were less than a year after her death, and the court will remember that, notwithstanding the statement of Mr. Class, that they did not disclose fully and freely all the relations of Shepard and Brandon, but merely stated he had relations which were perfectly natural, before and after the death of his wife. We are trying to show these were not perfectly natural relations.

Mr. Class: I said, they were perfectly natural during the year 1930.

The Court: The objection will be overruled.

Mr. Class: Exception.

Mr. Wyman: I desire to have these admitted, your honor.
The Court: They will be received.
Government's Exhibit 32, read by Mr. Wyman to the jury is as follows:

"Major Charles A. Shepard, Medical Corps, United States Army. To my Dear Sweetheart 'because I love you.' Charlie.

"Major Charles A. Shepard, Medical Corps, United States Army. Wish I could take the place of these flowers this morning and tell you my message of love personally. Charlie.

"Major Charles A. Shepard, Medical Corps, United States Army. *I love you—believe me—I love you.* Your Charlie.

"The sweetness of these lilies is symbolic of my sweetheart, and may their perfume bring you many happy memories of your absent loved one. Your Charlie."

Government's Exhibit 32 handed me I received thru
194 the mail with an order for flowers to go each date these cards are marked on, the dates in the corner. Those were the standing orders, and one of these cards was to be placed in each date and whatever date that was. It was the custom of Major Shepard for each basket of flowers he had me send to Miss Brandon to always furnish a card to go with those flowers. These are the cards that were not delivered. The charge account would show the dates orders for flowers were filled. (Government's Exhibit 32 offered and received in evidence.)

Government's Exhibit 33 handed me is a communication I received from C. A. Shepard. (Government's Exhibit 33 was offered and received in evidence.) Gladiolas were substituted for peonies on the order of May 30, 1929 for flowers sent by Major Shepard to Miss Brandon. Government's Exhibit 33 is as follows:

"Box 278, Fitzsimons General, Denver, Colorado.
"Hauser Floral Co., 139 N. Alamo, San Antonio, Tex.

"Gentlemen: Sometime ago I sent you a number of envelopes containing cards to be sent with weekly order of flowers to Miss G. Brandon, 2604 So. Presa St. I wrote you asking you to send on her birthday, Feb. 23d, a rosebud for each year (25). Received word today that you sent 6 American Beauty roses instead. What was the reason? Why did you change the order?

You spoiled the birthday message for me. About Easter I wrote and asked you to send an Easter lily, 4 or 5 blooms, on Easter morning, April 20th. I first wrote a card for that day and dated it the 13th, then wrote you later to send card dated the 13th with the lily on the 20th. Please write me on receipt of this, as to whether this is fully understood.

Yours truly,

C. A. SHEPARD."

Government's Exhibit 34 is a communication I received from Chas. A. Shepard.

Mr. Kagey: No objection, except the general objection that we made before that it is immaterial, having happened long after the death of Mrs. Shepard.

The Court: It will be received.

Mr. Wyman: I desire to read this, your honor. I do not know whether to hold up reading this until the jury finished looking at that exhibit—

The Court: That may be better.

Mr. Wyman: There was one word I could not make out.

Mr. Class: Maybe we can help you.

195 Mr. Kagey: If your honor please, at this time, we are willing if he wants the jury to read all of these communications, he may offer them in a body. We have no objection. The jury may read them all, and thus we might save a lot of time. It might save some time, if you want to read them all. Let him offer them all, and let the jury read them.

Mr. Class: We will agree to let the jury take these letters with them, and read them at their leisure, or during recess.

Mr. Brewster: We object to the attempt to minimize this testimony. I realize the time comes when that has to be done, but we still prefer to produce it in our regular way.

The Court: Yes, I guess the defense will not be allowed to tell the government how to proceed.

Mr. Kagey: We except to the ruling of the court. We think we have a right, at any time, to offer to do something.

The Court: These offers have been made at various times.

Mr. Kagey: Yes, as to each of these matters.

Mr. Wyman: I desire to read government's exhibit 34.

(Government's Exhibit 34, marked and received in evidence.)

Government's Exhibit 34 is as follows:

"P. O. Box 278, Fitzsimons General Hosp., Denver, Colo.

"Hauser Floral Co., 109 No. Alamo St., San Antonio, Tex.

"Gentlemen: Your letter received. You addressed your letter to P. O. box 278, Denver, instead of as above. We have a branch P. O. here, 10 miles from Denver. Please note correct address.

"Enclosed find cards dated to cover period up to May 4. Please continue sending flowers to same address, sending statement to me monthly.

Yours truly,

C. A. SHEPARD, Major M. C.

"P. S. On Sunday, Feb. 23, send to same address in place of regular shipment, exactly 25 rosebuds as this date is her birthday—red or pink. For Easter Sunday, April 13, send an Easter lily plant with at least 4 blossoms."

Cross Examination.

We had standing orders from the Major for flowers. There is not anything unusual about a man sending flowers to a woman in San Antonio, Texas, on her birthday. (Defendant's Exhibit was identified and offered in evidence being a statement furnished to Shepard's atty., Class, for a bill of $54.00 marked "Paid in full," commencing Mar. 30-29, ending Apr. 7-30.)

I know Mr. Caffrey sitting at the end of the table. I never talked to him at San Antonio about my testimony in this case and never did that I know of. I talked with C. R. Davis about these flowers to Miss Brandon. It was merely that they wanted the records up here and he said to bring the records.

Redirect Examination.

I came here in response to a government subpoena.

Frank G. Hall was called as a witness on behalf of
196 the Government having been duly sworn, testified as follows:

My name is Frank Hall. I live in Kansas City, Missouri. I am a doctor practicing pathology and have been since 1900. I graduated from the University of Kansas and do general clinical laboratory work, including post mortems and examinations of specimens for diagnosis.

Q. I want to ask you, doctor, and probably I shall have to ask the court's indulgence, and perhaps assistance in pronouncing some of these words. I want to ask you:

If a woman is suddenly taken sick on the evening, say, of May 20; she seems to be suffering considerably; the eye pupils are enlarged, the grounds in the eyes congested, and the pupils of the eyes congested, she vomits severely;

And then, in a day or so, the eye condition clears up, and she had no fever in excess of a degree above normal; she cannot retain anything on her stomach that amounts to anything; and continues this vomiting at intervals; and, after this condition has obtained for several days, her eyes clears up;

And, after they have been cleared up for several days, the condition suddenly reappears; the pupils suddenly again become enlarged, and the eye grounds and the eyes become engorged; then, in a short time, she begins to complain of pain in the lower region of the bowels, and these pains are followed by severe hemorrhages of the bowels, and the stools are bloody, with a blood count of white cells running up as high as 61,000 at different times, a gradual increase in the white cells for a while, and then a slight decrease, and then an increase of the cells, and then successive hemorrhages, and the stools are bloody; some of the urine shows cloudiness;

And the afternoon of her death, when she has apparently become in a sinking condition, a transfusion of blood is given her, then she passes away;

That her body is taken then, and an autopsy is performed, in which the stomach, spleen, the liver, all of the intestines—part of the liver, all of the intestines, one kidney and part of another, the spleen and the pancreas, are removed;

And the stomach, when grossly inspected by the physicians performing the operation, discloses two ulcers of the size approximately of a quarter to a half dollar, one of them partially healed but not entirely healed, the other ulcer unhealed; that the condition shows the big gut to have a large ulcer, sort of one central ulcer, or a spread-out ulcer, very extensive ulceration; the ulceration in the big gut is covered by what is known as a diptheritic membrane;

Then these viscera are taken to a laboratory and
197 examined, and the gross pathology discloses, as to the stomach, that a large ulcer occupies most of the section, with epithelium and glands and muscularis mucosae gone,

base formed by fibrous edematous tissue of submucosa, in which granulations are absent; at edges, appearance of fibroblastic islands suggest attempt to repair; the edges of mucosa adjacent to ulcer are rolled under, and mucosa here is lost except bases of glands and these tend to be dilated with mucus; interglandular stroma infiltrated with round cells and occasional cosinophile, round cell infiltration especially between fundi of glands and muscularis muccosae; submucosa around ulcer is extremely edematous, necrotic in places, fibrotic, very slight red cell extravastion, infiltrated with round cells, polys are inconspicuous in numbers; this submucosal reaction spreads widely beyond the actual area of loss of mucosa; occasional vessel in submucosa close to ulcer is thrombosed; the muscular layer beneath ulcer area is infiltrated with round cells and edoma separating the muscle bundles; this is most marked in the circular layer; submucosa beyond the ulcer area is edematous, slight perivascular round cell collections; serosa intact;

That the four sections of the stomach also show—that is—the microscopic examination—instead of the gross, you understand, I used the word microscopic—the mucosa is edematous, the epithelium desquamated, glands actively secreting, interglandular infiltration between fundi of glands and muscularis mucosae; at base of plica of mucosa are areas of necrosis of epithelium with breaks thru mucosa leading into submucosa; the submucosa here is massively edematous, slightly hemorrhagic much fibrin in exudate, with round cell infiltration around the necrotic area; muscularis and mucosa intact;

That the small intestine, under microscope, shows jejunum,—what does jejunum mean?

A. Jejunum is the upper portion.

Q. (Continuing) —mucosa shows surface epithelium and glandular epithelium desquamated; interglandular connective tissue remains, edematous, infiltrated with round and plasma cells with surface layer pigmented by brownish granules as rest of colon; occasional edematous lympoid follicle seen in submucosa close to muscularis; mucosae; submucosae edematous; muscularis intact; areas of mucosa are replaced with a fibrinous edematous exudate densely infiltrated with monos and polys; slight hemorrhage into it; this exudate extends into submucosa and is limited to area of loss of mucosa; the exudate extends laterally over surface of adjacent mucosa burying the glands under the layer of extension of exudate;

That the spleen shows, in two sections, small lymphoid nodules, no germinal centers, and widely separated by mass of tissue composed of medulla sinuses which are filled with large endothelial cells showing vacuolization; much pigment present; capsule slightly thickened; picture is result of low-grade toxin absorption; not an acute spleen;

In the pancreas, in two sections, most post mortem necrotic degeneration is marked. Outline of acinae and islands can be distinguished but epithelium cells are necrosed. One section shows nodule of bacilli with no inflammatory reaction
198 about it, post mortem invasion by bacteria; hyaline deposits in some of vessels; no pathology can be given;

In the liver, in two sections, the capsule is normal; lobular arrangement normal; moderate fat deposition as large droplets in lives strands; slight increase in pigment deposition in central cells of lobules; small focal collections of lymphocytes and endothelial leukocytes in interlobular stroma;

The mesenteric nodes show atrophy of lymphoid elements, dilated sinuses; increased fibrosis;

In the kidney, in four sections, one section shows a dimpling of surface due to scar formation; in this area of cortex, there is increased fibrosis, glomeruli sclerosis with round cells infiltration thru the fibrosed area; one section shows a small cyst beneath the surface; sections show a tendency to increase of interstitial connective tissue, with round cell infiltration into it especially noticeable between tubules of the cortical rays; there is vascular congestion of stellate vessels with occasional small hemorrhage; in some of tubules of convolted area are hyaline casts; epithelium of tubules is intact;

Then assume that a further examination of the kidneys microscopically shows that the chief lesion is the degeneration of the epithelium of convoluted tubules, cloudy swelling and hyalin; some of the cells are necrotic and there is some desquamation; hyalin and granular debris fill some tubules, less abundant in others; no intrabular exudate or calcification; there are patches of interstitial exudate, chiefly lymphocytic, in pryamids and cortex; an occasional fibrosed glomerulus; here again is evidence of toxic action;

That a further examination of the colon discloses the seat of a very active ulcerative croupous inflammation, several sharply defined ulcers filled with fibrino-purulent exudate which cover the adjacent intact mucosa; the entire submucosa is very edematous, but contains little exudate tho there is con-

siderable in the lymphatics; the muscularis is practically free; the serosa moderately edematous; the cellular exudate in the mucosa is largely polymorphs, there is not much macrophage reaction; clumps of bacteria are stained in the superficial layers of the pseudomembrane, but no ediological fact is evident;

That the appendix showed the mucosa atrophied—a few gland elements remaining—but there is some edema and exudate; the superficial portion is necrotic; there is definite scarring of submucosa, but muscularis and serosa are practically free;

That the spleen showed some edema of pulp which contains also considerable exudate and blood pigment; the follicles are somewhat reduced in size;

That the pancreas showed moderate post mortem change;

That, in the ileum, there is a little cellular reaction in the mucosa, but no ulceration; the submucosa is moderately edematous;

The stomach, I have already described;

Now, further assume that the gross examination of the viscera and the organs that I have described, showed the stomach was covered with think, tenacious mucus; several prominent longitudinal folds; in triangular area made by two of these as they converged on the pyloris was a large triangular area, base 15 millimeters altitude 23 millimeters with apex toward pyloris; base of ulcer smooth, edges under-
199 mined and heaped up; no evidence of recent hemorrhage; at base of prominent longitudinal folds were several roughly circular, dark brown, approximately 5 millimeters diameter, areas of necrosis of mucosa, which on section showed slit like loss of mucosal substance with brownish area extending about break in mucosa into a much wider area of submucosa.

That the intestine, upon gross examination, shows, no pathology noted in jejenum, ilium, or duodenum, except wall seemed thinner than normal: bile stained mucus clung to wall of ilium; no evidence of hemorrhage in the small gut; few mesenteric nodes felt in mesenteric fat; these were small and soft. Solitary follicles inconspicuous; serosa normal—no gross evidence of congestion; appendix normal—approximately 65 by 6 millimeters; beginning with caecum, entire mucosa of large gut is stained brownish; this staining is confined to superficial layer of gut wall; in region of sigmoid are numerous

superficial low elevations of a membrane deposition on the mucosa, largest is about 10 by 5 millimeters, smallest pin-head size, tend to be oval in shape and lie longitudinally in gut; this surface exudate can be easily removed leaving a shallow ulceration in mucosa; in rest of large gut there are similar lesions but discrete; appearance is that of a diptheritic colitis; on section these lesions are confined to mucosa and superficial part of submucosa; rectum is comparatively free of these lesions;

That, in the kidney, one kidney and part of the other, the capsule stripped easily, leaving only a small occasional tear in kidney substance; several depressed areas in surface of cortex suggesting contraction of old scars; occasional small (2 millimet) cysts seen just beneath surface; surface vessels slightly injected; markings of cortex and medulla indistinct; pyramid markings hazy; pelvic fat decreased;

In the pancreas, a small tag was adherent to the duodenum; dull hazy fat infiltrated, apparently post mortem changes present;

That the spleen was not enlarged, the capsule not thickened; on section, it was congested with apleenic nodules inconspicuous;

Now, assume, doctor, further, that portions of these organs were chemically tested and analyzed, and a quantitive analysis made; and that specimens from the necropsy as described were received in good condition in a sealed tin; small blocks of all the tissues were excised; that the spleen, one kidney, one small piece of liver, and sufficient intestine to make 500 grams were subjected to analysis according to the procedure outlined by Autenrieth Manual for the detection of poisons under the Fresenius-von Babo method, whatever that is; that tissue was finely minced and treated with hydrochloric acid and potassium chlorate until organic matter was destroyed; excess of acid was removed by evaporation, and the solution treated with hydrogen suplid; a heavy black precipitate was obtained; this prescipitate was treated with equal parts of ammonia and yellow ammonium suplhid; the filtrate so obtained was tested for arsenic, antimony, tin and copper, with negative results; that the precipitate remaining was treated with nitric acid, and that portion insoluble in nitric acid was treated with hydrochloric acid and potassium chloride; the solution so obtained gave the stannous chlorid test and the

copper test for mercury, and upon the addition of potassium iodid, the red precipitate of mercuric iodid was obtained; the tests for all other metals were negative;

Assuming the test for all of the metals was negative,
200 and this test was disclosed to be positive for mercury, and that there was obtained from the tests in these vessels between two and three grains of mercury, and then, doctor, assuming that another quantitative examination of portions of the viscera were had, as follows:

The stomach, 36.7 grams, the intestines, 25 grams, and that, in applying this amount to these particular viscera, the established test for the finding of mercury, there was found 3.6 milligrams of mercury; that 20.4 grams of weight was then submitted to the same chemical test, and there was found 2-1/2 milligrams of mercury; that there was then submitted to this same test, 6.3 grams of liver, 4.4 grams of muscle, and that these were found to contain 7 one-hundredths of a milligram of mercury; that the weight of the organs of the deceased were those of a normal woman of 32—

The Court: 37.

Mr. Brewster: What?

The Court: 37, is that not the age?

Mr. Brewster: I did not hear.

Mr. Kagey: 37.

The Court: I thought 37, instead of 32.

Mr. Brewster: Q. (Continuing) —37, that those were normal for a woman of that age;

Assume further one thing that I omitted, that she had periods where she was confused mentally, and was apparently plucking something out of the air;

Assuming those things to have been found, and the conditions I have related, are you able, doctor, to form an opinion as to the cause of death of the party?

A. I am.

Q. What is such an opinion?

Mr. Kagey: Just a moment, the defendant objects to the question for the reason it assumes a number of conclusions to which the witnesses have not testified; it does not contain all of the facts, does not contain a fair relation of the facts; that it assumes to give certain causes and effects and results, nor warranted by the evidence, and it has no proper foundation as a gyphothetical question in this case.

The Court: He may answer.

Mr. Kagey: Note an exception.

A. In my opinion, this patient died as the result of mercury poisoning.

Mr. Brewster: Q. Doctor, in your opinion, would the appearance of the separate ulcers, one partly healed and one in which no healing was commenced, indicate anything as to the manner in which this poison was given?

A. It is fair to assume that old and larger ulcer preceded the smaller ulcer by some interval of time, because the larger ulcer had begun to heal, and the smaller ulcer was showing no healing reaction, and it would appear that, at least two administrations or receiptions of the poison had been experienced.

I am more or less familiar with the action of mercury and its properties and the peculiarities in mercury poisoning, or rather the action of mercury on the system that distinguishes it from other metallic poison, most other metallic poisons are continuous in their manifestations of activity, and in
201 mercury after the original dose is given the patient, if it is not set, there is a material interval in which the patient feels that he is going to get well, and then a little later comes a period of increasing difficulty with the development of stomatitis and inflammation of the colon, and the patient under the stress of this development, generally dies. It has a very striking manner of action in the manner which the mercury strikes the stomach, the little intestine and the big intestine. Generally the first action after the ingestion of a toxic dose, of mercury is the development of salivation, a sore mouth that may continue for a few days or a week, and the next thing that becomes distressing is diarrhea, and if there has been enough mercury ingested, that diarrhea rapidly becomes a hemorrhagic enteritis. The fact that this woman did suffer from diarrhea at times and then constipation, and if she had been sick 36 hours, developed a soreness in the mouth, commencing low down on the gums, does not effect my opinion in any way. Most cases are attended by a diminuation of urinary output, and sometimes a complete suspension of kidney function. This is not true in all cases, that depends on factors. The factors are the mode and type of administration. If the dose is small and taken in such form as to be slow formed, the kidneys have time to adjust themselves and the lack of urinary secretions becomes such

a striking phenonenon. Mercury would not elect any one organ. It is thru the organs, all of them, but for some strange and unknown reason it attacks particular organs to the relative sparing of other organs.

Q. I asked you about, and have stated to you, this condition of sore mouth: How is it that happens after the other symptoms?

A. Ordinarily, the sore mouth is complained of the first thing. Just why, in this particular case, the situation happened like it did is hard to say. This patient might have had sore mouth a little while before she complained of it.

If mercury is taken you get a sore mouth. If mercury is concentrated and not liquid the mouth is burned as in carbolic acid. If it spared the mouth it would return to
202 the structures on the return trip. If mercury was taken in doses not large enough to burn the mouth as it went in, the symptoms would appear later. Secretion and absorption and reabsorption occur sometimes half a dozen or a dozen times in mercury poisoning. When people take enough mercury to kill them you find just such a picture as you recite in this case. The ulceration described as being found in the big gut is absolutely characteristic of mercury.

Mr. Brewster: Q. In my statement to you of the hypothetical question, did you note anything that particularly attracted your attention to the fact that this was probably a mercurial poison that I have not asked you about?

A. No, sir.

Cross Examination.

I am not a clinician, but of course I see lots of cases clinically. I think I am able to pass upon the symptoms and signs of the last illness of the deceased. I always prefer to cross type blood but many institutions and individuals do not. I have never seen a catastrophe following the administration of blood of two types belonging to group 2, but I have read of them. That is the reason I cross type before using.

Q. Do you not think if they were not cross typed that failure to do so might result fatally and cause death by cardiac dilation?

A. I think not.

Q. Is it not true there are a number of cases where it has occurred?

A. I recollect a number of cases where they died that

have been accused of resulting in death. Whether that be true or not I am sure I cannot bear witness to it.

I saw no gross organs of any sort in basing my opinion upon the pathological findings.

Q. Is it not true that a fatal reaction following blood transfusion is due to anapathylactic shock?

A. Yes, that is true when bloods belonging to different groups.

Q. But, doctor, is it not true where they belong to the same type but are not cross-typed?

A. No, that is not true, sir. There are several sub-varieties of types but they are so rare that ordinary practice does not take them into consideration.

Q. Your attention was called to neuro-retinitis
203. of the subject concerning whom you testified, is that right?

A. I understand it was neuro-retinitis.

Q. What would cause that?

A. The recitation here was that it was an engorgment of the blood vessels of the retina, but not an inflammation of that sort.

Q. Have you ever heard of that sort of symptom occurring in bichlorid of mercury poisoning?

A. Yes, I have heard of it but have never seen such a thing.

I do not examine eyes, that is not part of my job. There is a certain degree of destruction and repair going on in all parts of the body, but they are not discernible upon microscopic examination. There are other poisons causing destruction and repair to a certain degree in other cells of the kidney. If doses of mercury were small but continued long enough to cause death I would expect in a case of that kind for more than one specimen of urine show of albumin. I do not think the old ulcers would be aggravated by the taking of another dose of mercury, but I cannot pronounce upon it from my own experience. The new ulcers could result from secondary re-absorption.

Q. Have you ever known of a white blood count of 61,500 to occur in any infection of poison?

A. It is very common infection in poisons, and does not supervene until necrosis occurs.

Q. Was not that an uncommonly high white blood count?

A. It was a pretty high white blood count, yes, it was.

As a matter of fact, I cannot explain why elevation of leukocytes ever occurs, that is one of the mechanism, that is not really understood. Most of the lesions found after death are marks of the disease rather than the cause of death. I have performed thousands of autopsies. When I perform an autopsy I keep a record of them when it is done if I get hold of somebody that can wield the pencil. If not, I have to wait until I finish the post-mortem and write it out.

Q. If you thought the case was extremely important and that a question might arise, in other words, as a pathologist and a medical man, would you say if you thought it might be a court case that you would then make a record?

A. I would always get a stenographer, yes, sir.

Redirect Examination.

By Mr. Brewster: Q. Doctor, just one question, if
204 you were performing an autopsy and cut out a gut and found a great big ulcer in it, what effect would the failure of the stenographer to be there have on that lesion?

Mr. Kagey: We object as manifestly improper.

The Court: You may answer the question.

Mr. Kagey: Exception.

A. The absence of the stenographer would not alter the character of the lesion a particle.

Mr. Brewster: Q. And the only purpose in having it written would be if you found something you wanted to remember in case the organs were destroyed, to have a record of it?

A. That is exactly the object.

Q. That is the only purpose it could serve.

Mr. Kagey: We move to strike out the statement of counsel as argumentative, and not a question.

Mr. Brewster: Q. Is it the only purpose?

The Court: Overruled.

Mr. Kagey: Exception.

Mr. Brewster: The court has overruled it.

Q. In taking out the organs here, and then sending the organs to Major Mahon, was there anything that, having a stenographer there, in any way would have effected the condition of the organs?

A. No, sir—

Mr. Kagey: Just a moment—

Mr. Brewster: Well—

Mr. Kagey: Give us an opportunity to object. We move to strike out the answer, and object to the question for the reason that it is leading and suggestive and argumentative, and an effort on the part of the counsel to cross-examine his own witness.

The Court: Overruled.

Mr. Kagey: Exception.

Anaphylactics occurs immediately after a blood transfusion. It would not occur in half an hour or so. Mercury hits different organs more severely. It would be equally distributed thruout the entire organ. If mercury gets into the kidneys, it is equally distributed. It is equally distributed in the liver and kidney, altho there might not be as much in one as in the other. It distributes thruout the stomach wall after it gets in circulation, the same as other organs.

Recross Examination.

The blood supply is not the same to all parts of the kidney. The kidney *is* a peculiar organ. The vascular tufts in the kidneys, some of them are open, some of them opening and going into function all the time and it is their closing down their ceasing function; at no time, at no interval are all the tufts in action at the same time. Mercury spares the heart to a very great degree, and so far as I know, also the lungs. They are not depositional points for mercury. I do not know about the brain. The primary reaction to a blood
205 transfusion would come right away. The hemolytic reaction might take several hours to develop. I believe that hemolysis usually occurs within half an hour to three hours.

Q. Now, hemolysis causes thrombin to form in different parts of the body?

A. The first effect of hemolysis is to dissolve the red cells and convert them into a lake flow and that is an invitation to thrombosis, but it is not possibly the cause of thrombin. We have that in things which are not associated with such laking phenomens in the blood.

There must be other mechanisms to cause that. Thrombin may or may not hit the vessels of the heart the same as any other part of the body. I never saw one hit the heart. They do nearly always hit the lungs before they hit the heart.

They could hit the brain. If they hit the brain or the heart or the lungs, it would paralyze the heart, that the brain was supplying motive power for, and it would be a paralysis of the arm or leg or the other part of the body. If it hit the heart it would be too bad, it would be a collarary thrombosis, and they would die right now.

Redirect Examination.

By Mr. Brewster: Q. Would blood transfusion cause lesions in the bowels?

A. No, sir.

Q. Would it cause them in the stomach?

A. No, sir.

Q. It is frequent that a man may have cancer and die under the operation?

A. Yes, sir.

Q. But he has a fatal cancer, just the same?

A. Yes, sir.

A. A blood transfusion is a recognized treatment for disease?

A. Yes, sir. Not so much treatment of disease as tiding over critical periods where there has been a big loss of blood.

Q. Blood transfusion, the patient must be in such a critical condition, from an unknown cause, or a known cause, as to make transfusion necessary?

A. Yes, sir.

Q. Sometimes, in a few minutes' time, and at other times not so long?

A. That is true.

Q. Just like an operation for cancer, appendicitis, and troubles of that kind, is that right?

Mr. Kagey: Object to this as leading and suggestive. Counsel is testifying.

The Court: Overruled.

Mr. Kagey: Note an exception.

Mr. Brewster: That is all.

Mr. Kagey: That is all.

J. V. Bell called as a witness for the Government, 206 having first been duly sworn, testified as follows:

My name is J. V. Bell. I reside at San Antonio, Texas. I am in the Special Service Department with the

Railway Express Agency. I have in my possession records showing delivery of articles by my company to Miss Grace Brandon.

(Government's Exhibit 35, marked and received in evidence.) Exhibit 35 is Railway Express Company waybill of package destined to San Antonio, Texas, consignee, G. Brandon, dated May 16, 1929; address at destination 2204 So. Presa, forwarding office, Omaha, Nebraska (830-1), Value $12.00. Description of article (bird); shipper, Max Geister, express charges prepaid. Exhibit 35 was also package on hand May 18, 1929, and shows attempted delivery at 2204 So. Presa St., and also shows receipt of package signed, "Grace Brandon."

The shipment was received at San Antonio, and placed on hand and delivered to the consignee, Grace Brandon. (Government's Exhibit 36 marked and admitted in evidence, being waybill 5118, consisting of three pages involving the shipment of one box from Omaha, Nebraska, to Grace Brandon at San Antonio, Texas, dated May 14, 1929.) (Government's Exhibit 37, marked and admitted in evidence.) Government's Exhibit 37 was the movement of one sealed package with a declared value of $75.00, weight 11 ounces, on our moneybill 362,083, November 20, 1929, shipment by C. A. Shepard, received in San Antonio and placed on hand November 18, delivered and signed "G. L. Brandon" at 5:00 P. M. November 19, 1929. It was shipped from Junction City, Kansas. (Government's Exhibit 37 objected to and objection saved.) (Government's Exhibit 38 marked and received in evidence.) This is a shipment consisting of one crate, weighing 112 pounds, value, $150, moving from Denver, Colorado, on our prepaid waybill 8719, stamp is dated February 17, 1930, signed by Grace L. Brandon and delivered at 2:20 P. M. of February 19, 1930. The shipment is F. Davis. (Objection is made to the receipt of Government's Exhibit 38, and exception saved.)

Cross Examination.

By Mr. Class: Q. With regard to the first three exhibits, Mr. Bell, the Omaha shipment, I understood you to say, your waybill is dated May 16, 1929. Do you know how long before that date it was received at your office, before it was billed out?

207

A. No, I would have no way of knowing that.

Ralph D. Young called as witness on behalf of the Government, having first been duly sworn, testified as follows:

My name is Ralph D. Young. I reside at San Antonio, Texas, and am a salesman for the San Antonio Buick Company and I was so employed during the year of 1929. I am acquainted with the defendant, C. A. Shepard and had a conversation with him relative to the purchase of an automobile from my concern about November 4, 1929.

Q. Just state, as nearly as you can, the substance of the conversation?

Mr. Class: May it please the court, we object to any further testimony of this witness with respect to any conversation, or transaction had between the defendant and the San Antonio Buick Company, or this witness, for the reason that it is immaterial, long after the death of Mrs. Shepard, and does not tent to prove or disprove any of the issues in this case.

The Court: He may answer.

Mr. Class: We save an exception.

About November 4, 1929, Major Shepard came into the salesroom and expressed a desire to look at a new Buick automobile. He stated he had lost his family as I remember, that he would not have any particular use for the car he was then driving, and wished to trade it in on a coupe for his niece. I showed him some cars that we had, that afterward culminated in a sale by me of a Buick coupe to C. A. Shepard. I received authority for delivery of the automobile on November 19; about November 23, I delivered the car to Miss Grace Brandon. Government's Exhibit 39 handed me is a communication I received from the defendant, C. A. Shepard. (Government's Exhibit 39, marked and received in evidence.)

Mr. Class: May it please the court, we have no objection to the reception in evidence of government's exhibit 39, other than the one stated to the court with regard to all the testimony by this witness, and I think, at this time, we may have an understanding, without making the objection toward that end, that the objection goes to all this line of examination, without repeating it at this time.

The Court: It depends on what is offered, and what the objection is. It will be received.

Mr. Class: Save an exception.

Mr. Wyman: I should like permission to read this, your honor.

Government's Exhibit 39 is as follows:

208 "Fort Riley, Kansas, November 14, 1929.

"Mr. Ralph D. Young, San Antonio, Texas.

"Dear Mr. Young: This letter will be handed you by Miss Brandon, which will be your authority to order the Buick Coupe, wood wheels, broadcloth upholstery, price $1500, on terms as stated by you. Forward all papers to me at address below.

"The Chrysler agency said the license for a car could be made out in Miss Brandon's name, just as well as in mine and if they can do this, then your firm can too, and this is the way we want it. I will attend to the financial end of it, but the card is to be Miss Brandon's and appear on the records in her name. Please see that she is fully instructed in the handling and care of the car, and give her the service that is synonomous with the name Buick.

"When the car is ready, she will turn over the Chrysler to you. Please notify me when same is done, and she has received her Buick.

"Thanking you for all your courtesy and trusting that you will continue to extend the same to Miss Brandon, I am

Fraternally & sincerely,

C. A. SHEPARD.

"It is understood the monthly payments are to commence January 2d. Address me at B. 6, Fitzsimons General Hospital, Denver, Colorado, until further notice."

I turned the car over to her, and she turned the Chrysler 75 Sedan over to us.

Cross Examination.

I do not know where that Buick car is now and I could not tell you when I last saw it. It was delivered in November, 1929. I saw it on several occasions after that, a week, possibly a month later, and so on, being driven by Miss Grace Brandon. It was a new Buick coupe.

H. L. Murray, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

My name is H. L. Murray. I reside at San Antonio, Texas,

and am a salesman for the Lee-Hertzberg Jewelry Company. I am acquainted with Major Shepard and Miss Grace Brandon by sight. I remember the occasion of the defendant, C. A. Shepard, and Miss Brandon coming into my place of business in San Antonio, and buying a bracelet. It was a small silver bracelet. I cannot remember the exact time it was; it was prior to two other sales that I had with Major Shepard.
209 I assume it was about 1929. I have some correspondence I had with Major Shepard. Government's Exhibit 40 handed me is a communication I received from the defendant, C. A. Shepard; the first article I sold to the defendant, C. A. Shepard, was a small silver bracelet.

Q. Referring again to this government's exhibit 40, and the date of that, I will ask you now if you are able to state approximately when it was that you sold that bracelet?

A. (Referring to paper) I cannot recall anything by this, sir; I do *not* know anything, I do not see anything here. This matter is under date, Sept. 18, 1929. It was prior to that date, but I cannot—

Q. You say, it was prior to the date of that letter?

A. Yes, sir.

Q. I will ask you if it states anything in that letter about an article having sold by you, or someone in your store, the November previous to that?

Mr. Class: We object to any contents of the letter. Certainly, under the primary rules of evidence, that is not permissible.

The Court: Yes, I suppose the letter would be the best evidence.

A. I do not think there is anything in there.

The Court: The letter might be used by the witness to refresh his memory.

Mr. Class: Oh, yes, but that is not the question, your honor.

The Court: No.

The Witness: This does say—

Mr. Class: No, just a moment.

Mr. Wyman: Just a moment, I will offer it, your honor. The government desires to offer exhibit 40 in evidence.

Mr. Class: All of that?

Mr. Wyman: No, just this first page.

Mr. Class: We make the objection, first, that it is immaterial, and, on its face, has to do with a transaction long

after the death of Mrs. Shepard, and does not prove or tend to prove any issue in this case. Secondly, that it is vague, indefinite and uncertain, and thirdly, that it is immaterial.

The Court: It will be received.

Mr. Class: We save an exception, if the court please.

Mr. Wyman: I should like to read this to the jury.

The Court: All right.

(Government's Exhibit 40 marked and received in evidence.)

Government's Exhibit 40, being two letters as follows:

"Fitzsimons General Hospital,
Denver, Colorado, Sept. 18/29.

"Herzbergs, Jewelers, San Antonio, Texas.

"Gentlemen:

"When I was in San Antonio last June I called in at your store, relative to having a diamond mounted in an orange blossom engagement ring.

"The gentleman with whom I talked, and from whom I made a purchase last November, told me to send the stone on, and he would take care of it for me. Cannot recall his name, but believe it was Langdon. However, if you will show him this letter, he will remember our conversation.

"If you will have him write me, immediately, will express the stone, as I am anxious to have the ring finished right away.

Sincerely yours,
C. A. SHEPARD, Major, M. C."

"September 21, 1929.

210 "Major C. A. Shepard, Fitzsimmons General Hospital, Denver, Colorado.

"My dear Major: We are in receipt of your letter of September 18, 1929, and was turned over to me for reply. Would advise that I am the party who used to sell you when you were in town, and talked to you upon your last visit relative to mounting the diamond ring. Would advise we have these both in platinum and 18k white gold. Can supply the Orange Blossom design in white gold from $25.00, and with diamonds on the side, they range $40.00, $50.00, and $52.00. In platinum we can furnish you Orange Blossom, Tiffany mounting for $75.00.

"As we have other mountings with diamonds, etc.,

on the side, it would be right hard to give you any exact figures on these, as they run as high as $250.00. Would advise that you send us your ring and we will be very glad to see size of your diamond and quote you exact price on ring mounting and give you description of same before executing this work.

"Trusting you are real well and we may see you again in San Antonio some time in the near future, assuring you of our appreciation of your inquiry and my personal desire to serve you, I am,

Very truly yours,

E. Hertzberg Jewelry Company,

"HLM/fd By "

From the date on that letter I would say that Major Shepard was in our store in November, 1928. $9.00 or $10.00 was paid for that bracelet. Our records show the purchase of other jewelry by the defendant, C. A. Shepard. On October 1, 1929, there was one ring mounting with two diamonds set, for Major Shepard.

Q. That record is what is now marked government's Exhibit 41?

A. Yes, sir.

Mr. Wyman: I desire to offer this, government's Exhibit 41, in evidence. This will be received, your honor?

The Court: Yes.

Mr. Class: We object to it on the ground it is immaterial, does not tend to prove or disprove any issues.

The Court: It will be received.

Mr. Class: Save an exception.

Government's Exhibit 41 is as follows:

"Nov. 1, 1929.

"Major Chas. A. Shepard, care Fitzsimmons Gen. Hospital, Denver, Colorado.

1929 Date			Charge	Credit	Balance
Oct.					
1	1 ring mtg.	72506-43	60.00		
	2 Diamonds		15.00		
	By cash			40.00	35.00
	Oct. 30, 1929, By cash			35.00	

(The Witness.) The diamonds were a charge item. There were two diamonds put in the shank. The record refers to the value of the mounting only.

Government's Exhibit 42 handed me shows one dinner ring, No. 2 A 577-12.

Mr. Wyman: We would offer in evidence govern-
211 ment's Exhibit 42.

Mr. Class: May it please the court, we object to the reception in evidence of government's Exhibit 42, for the reason it is a transaction long after the death of Mrs. Shepard, and is immaterial, and does not tend to prove or disprove any issue in this case.

The Court: What is the date?

Mr. Class: The date of the transaction was December 23, 1929, and the bill is dated January 1, 1930.

The Court: Yes, it will be received.

Mr. Class: Save an exception.

Mr. Wyman: I desire to read this.

Government's Exhibit 42 is a record of purchase made from our company by C. A. Shepard.

Government's Exhibit 42 is as follows:

"Jan. 1, 1930.

"Maj. C. A. Shepard, care, Fitzsimmons Hospital, Denver, Colorado.

1929 Date		Charge	Credit	Balance
Dec. 23	1 dinner ring 7A577-12	100.00		
	Jan. 2, 1930 By cash		50.00	50.00
	Feb. 1, 1930 By cash		50.00"	

Government's Exhibit 43 handed me in two pages is a communication I received from defendant, C. A. Shepard. It is dated September 24, 1929. Government's Exhibit 43, marked and received in evidence is as follows: (Objected to on same ground as Govt. Exhibit 42, overruled and exceptions saved.)

"Fitzsimmons General Hospital

Denver, Colorado, Sept. 24, 1929.

"Mr. H. L. Murray, c/o E. Hertzberg Jewelry Co., San Antonio, Texas.

"Dear Mr. Murray: Your letter received last evening, I am sorry that I had forgotten your name, but felt assured that a letter to the firm would reach you. The mounting you showed me, when I was there in June, was $35, square setting, platinum points, in the orange blossom pattern. Would like the orange blossom in

platinium, Tiffany mounting, price quoted $75.00 provided I can pay for same in two monthly installments, as I only get paid the first of each month.

"I am sending you the diamond ring by registered mail this date. Have written Miss G. Brandon to call in, and see you, for correct measurements. As this stone is in a ring already, please do not show same to her until you have it mounted. If the above arrangement of two monthly payments will be satisfactory, $40.00 first of October, and bal. 1st of November (Will be there at that time) please mount in the platinium, Tiffany setting, orange blossom pattern, and deliver to Miss Brandon when ready. Let me know when ring is ready and delivered, and would appreciate your valuation on the stone. I paid $250.00 for it 13 years ago. One jeweler here valued it at $300, another $350, both reliable houses. I insured it for the latter amount to be on the safe side, in case of loss in the mail. Am
212 enclosing cheque for $40.00 dated October 1, as part payment. If this arrangement is not satisfactory let me know and I will have to arrange it some other way in a cheaper ring.

Sincerely yours,
C. A. SHEPARD, Major, M. C."
September 27, 1929.

"Major C. A. Shepard, M. C., c/o Fitzsimmons Gen. Hospital, Denver, Colo.

"My dear Major: Your letter with inclosure, check drawn in our favor for $40.00 was received yesterday and the ring arrived by registered mail this morning. We are herewith inclosing you one design drawn and one printed of the ring you inquire about. I am of the opinion that you would not want the ring in a Tiffany mounting, as the one the diamond is now in a Tiffany. You will note from the drawn design the exact lines of the mounting I would advise for your diamond. You will also note there is a small diamond set on each side of the shank. We will be very glad to set this stone for you upon receipt of letter from you advising us if the inclosed drawing is satisfactory. We will charge you with the amount of this mounting, $75.00, and credit you with the check for $40.00, which

will ne agreeable to us as per your letter, to be paid early in November.

"We will comply with your request and not show party in question, mentioned in your letter, anything until advised by you to deliver same; will take size from her when she comes in. Will weigh stone and give you estimate when we inform you of the delivery of this ring. Please return drawing in your next letter. Assuring you of our appreciation of your favor and my personal desire to be of service that I can to you at any time, I am

Very truly yours,

HLM/vd
encls.

E. Hertzberg Jewelry Co.
By.....";

Government's Exhibit 44 handed me is a communication I received from the defendant, C. A. Shepard.

Mr. Wyman: We desire to offer in evidence Government's Exhibit 44.

Mr. Class: The defendant objects to the reception in evidence of government's Exhibit 44, for the reason that it is immaterial. I call your honor's attention to the fact that it is dated October 1, 1929, long after the death of Mrs. Shepard, and does not tend to prove or disprove any issue in this case.

The Court: It may be received.

Mr. Class: We save an exception.

Mr. Wyman: I will read this, if your honor please.

Government's Exhibit 44 marked and received in evidence and is as follows:

"Fitzsimons Gen. Hospital,
Denver, Colo., Oct. 1, 1929.

"Mr. H. L. Murray, c/o E. Hertzberg Jewelry Co., San Antonio, Texas.

"Dear Mr. Murray: Your letter of the 27th enclosing drawing of ring, received today. The drawing is perfectly satisfactory, if it is what you advise; will leave it entirely to your judgment. I believe it will show the stone off much better than in the Tiffany mounting.

"When same is mounted and ready, please notify Miss Brandon, 2604 So. Presa St., and deliver ring to her
213 personally. Will be in to see you when I come down.

"Thanking you for your courtesy in sending me the drawing, which I am returning, I remain

Very truly,

C. A. SHEPARD."

I know the defendant, C. A. Shepard, was in our jewelry store in June, 1929, but I do not recall the exact dates. I would have to depend on the records.

Q. What conversation was it you had with the defendant, at that time, about that ring that he refers to in that exhibit?

A. He wanted a ring mounted, he told me he had a diamond that he wanted mounted, and asked to see some diamond which I showed him; that he was sending me the stone, that I could use my judgment in mounting it from.

Q. Was there anything else, that you can remember?

A. No, sir.

Mr. Class: Just a moment, if it pleases the court, we move to strike out the answer of the witness, and object to the question for the reason that it is immaterial, as it happened after the death of Mrs. Shepard.

The Court: June, 1929?

Mr. Class: Yes, your honor.

The Court: Overruled.

Mr. Class: Save an exception.

He wanted a lady's mounting.

Cross Examination.

These various presents were delivered to Miss Brandon at about the time of this correspondence mentioned.

Jas. W. Scott called as a witness on behalf of the government having been first duly sworn, testified as follows:

My name is Jas. W. Scott, I reside at Junction City, Kansas, and am in the jewelry business and have been in that business for 30 years. I know the defendant, C. A. Shepard, and have for about two years. I sold the defendant some jewelry in the winter of 1928. It was a white gold ring with an amethyst stone and I made it the right size, given to me and delivered to me, and he handed me the price of $10.00. My daughter showed him the ring first and gave him a card to get the correct size. In a few days the card came back, and I made the size given on that card. I have a record of the exact date I sold the ring. The date was January 18, 1929. The

record that I have also shows that on December 17, 1929,
a toilet set was sold him and the price of it was $25.00
214 We had some trouble about the toilet set getting broken.
The perfume bottle was broken in transit and we guarranteed safe arrival, and I replaced it with a new bottle.

Miss E. E. Williams, called as a witness on behalf of the government, having been first duly sworn, testified as follows:

My name is Miss E. E. Williams. I reside in San Antonio, Texas. My occupation is a post office clerk, and am called registry clerk. I have a record relative to the broken toilet set which was sent to Miss Grace Brandon at San Antonio, Texas, sometime the latter part of the year 1928. Government's exhibit handed me refers to an insured parcel that was received by the post office at San Antonio, December 20, 1928, and was a manicure set, as I remember. It was brown green and there were two pieces broken, the powder box and the stem of the perfume bottle, and we collected those two pieces and returned them to Junction City, Kansas, the office of origin, to be replaced. Miss Brandon brought them to the post office. Government's Exhibit 45 offered and received in evidence and identified as being a record of the return of the broken pieces of the toilet set sent to Junction City for replacement.

W. A. Shipe called as a witness on behalf of the Government, having been first duly sworn, testified as follows: My name is W. A. Shipe. I reside at Junction City, Kansas, and my business is with the Railway Express Agency. I have records showing shipment of articles and parcels from C. A. Shepard at Junction City to Miss Grace Brandon at San Antonio, Tex.

Government's Exhibit 46 handed me being in two pages show that on November 15, 1929, a sealed shipment of jewelry was received in our office from Major C. A. Shepard, consigned to Miss Grace Brandon, San Antonio, Texas, also this waybill covering this package going to San Antonio, Texas. The carbon of the original of Exhibit 46 bears the carbon signature of C. A. Shepard who is the sender. The original is given to the consignor, Mr. Shepard, in this case.

Exhibit 46 shows the value of the article as $75.00.

215 Mr. Wyman: Now, I desire to offer Exhibit 46, pages 1 and 2, in evidence.

. . . . . .

Mr. Class: May it please the court, we object to the reception in evidence of government's Exhibit 46, for the reason that it is immaterial, the transaction being had long after the death of Mrs. Shepard, and does not tend to proce or disprove any issue in this case.

The Court: It will be received.

Mr. Class: Save an exception.

A. H. Hafner, called as a witness on behalf of the government, having first been duly sworn, testified as follows: My name is A. H. Hafner. I reside at Junction, Kansas, and am engaged in the Postal service and have been for 27 years. I have with me records showing the rental of post office box at Junction City to C. A. Shepard. Government's Exhibit 47, handed me shows that Major C. A. Shepard rented a post office box at Junction City, Kansas, on December 29, 1928, and box 132 was assigned to him. I have a record of shipment of parcels thru our post office by the defendant, C. A. Shepard to Miss Grace Brandon.

Government's Exhibit 48 is a record made out by the defendant, C. A. Shepard showing change of address.

Mr. Wyman: We desire to offer in evidence government's Exhibit 48.

Mr. Class: Object to the reception, may it please the court, of government's Exhibit 48 in evidence, for the reason that it is immaterial. I call attention to the date, October 23, 1929, long after the death of Mrs. Shepard, and does not tend to prove or disprove any issue in this case.

The Court: It will be received.

Mr. Class: We save an exception.

Mr. Wyman: I ask permission to read this, your honor.

Exhibit 48 marked and received in evidence, part of which is as follows:

"Form 22 Order to change address 15 days
(This cancels all previous orders) Carriers'
Date Oct. 23, 1929 Indorsements

"Orders to forward general delivery mail (at city offices) expire in 30 days unless renewed. The signature and title of the authorized agent for a firm or company must also be given. Unless otherwise directed, both ordinary and registered mail of the first class will be forwarded. Inclose in envelope (first class postage) if mailed to another post office. Clerk's Indorsements

A. H. H.

Entered in Directory

"Print or write plainly and in full. 10/23/29

216 Name of Person or firm Major C. A. Shepard
New Address 2604 So. Presa St.
Permanent or for 5 days San Antonio
Last old address Box 132, Junction City
Other old addresses Fitzsimmons Gen. Hosp. Denver, Colo.
Signature of Patron or authorized agent. A. C. Shepard.

"Notify your correspondents of your change of address."

Government's Exhibit 49 handed me is a record of our office showing that on December 29, 1928, at 2:15 P. M. a package or parcel was presented at the office for registration, under No. 2034. Package was dispatched on K. C. & O. train 170, leaving Junction City about 4:20, and package addressed to Miss Grace Brandon, San Antonio, Texas.

R. R. Hochwater called as a witness on behalf of
217 the government having been duly sworn testified as follows:

My name is R. R. Hochwater. I reside at San Antonio, Texas, and am a letter carrier in the Post Office Department. The address of 2604 South Presa Street, San Antonio, Texas. was on my route as a letter carrier. I began delivering mail at that address in November or December of 1928 and have continued up to the present time. I have delivered letters in the handwriting of government's Exhibit 50 to that address

during the time I have been mail carrier on that route. I remember approximately as far back as March 1, 1929, of delivering one to four or five letters a week to that address in that handwriting. This continued until I think around November of 1929 when the address was changed.

Cross Examination.

I was on that route in 1929.

Redirect Examination.

I took letters in this handwriting (government's Exhibit 50) and addressed to this addressee during the months of March, April, May and June, 1929. I delivered between two, three, four and five a week. The amount would vary. That was continuous from week to week during those months.

Recross Examination.

I have no record showing how many letters I delivered to this door during the month of March, 1929, or in April, May or June. I do know I delivered from one to four or five a week during those months. Government Exhibit 50 offered and received in evidence without objection is as follows:

"Box 278
Fitzsimons General
Denver, Colo.

Denver
Mar. 13 pm 12:30
1930 oa p.m.
2 sr
tk
Colo

Miss Grace L. Brandon
2604 So. Presa St.
San Antonio, Texas.
(Under flap:)
218 G. L. B. 3-18-30.
C. R. D. 3-18-30.
J. J. L. 3-18-30."

Charlotta Schaefer called as a witness on behalf of
219 the government having been duly sworn testified as follows:

My name is Charlotta Schaefer and I reside at San Antonio, Texas, and am acquainted with Miss Grace Brandon. During the month of July, August or September of 1929 I remember

of Grace Brandon being over to my house when a call came for her. It was between the hours of six and ten P. M. I answered the telephone and the operator said "Long distance is calling Miss Brandon". I called Miss Brandon to the telephone.

Mr. Class: Move to strike this out, because no testimony to show the connection of the defendant with this telephone call to Miss Brandon.

Mr. Brewster: We will connect it before the day is over.

The Court: They may connect it.

Cross Examination.

There is a possibility that this call could have been as late as October, 1929, but I do not believe it was this late.

Paide Benbow was called as a witness on behalf of
220 the government having been first duly sworn testified as follows:

My name is Paide Benbow. I reside at San Antonio, Texas, and am auditor of the Stephen F. Austin Hotel and was part of the year 1929. I have a record in my possession showing the registration at that Hotel during the month of June, 1929. Government's Exhibit 51 handed me is a Registration card that is commonly used by our Hotel for the guests. It is registered by a Major C. A. Shepard of Fort Riley, Kansas. (It is admitted that Exhibit 51 is in the handwriting of Major C. A. Shepard.) Exhibit 51 is dated June 29, 1929.

Mr. Class: The general objection, may it please the court, that this exhibit is immaterial, and does not tend to prove or disprove any of the issues in this case.

The Court: Oh, I suppose it might not, but I assume the government has some good reason for introducing it.

Mr. Brewster: The date of it—

Mr. Wyman: —is the important part.

The Court: Yes, it will be admitted.

Mr. Wyman: I should like to read it.

Mr. Class: Save an exception.

(Government's Exhibit 51 admitted in evidence.)

Cross Examination.

I was subpoenaed by the government. That is the only reason I am here.

W. M. Ewing, Jr., called as a witness on behalf of
221 the government having been first duly sworn testified as follows:

My name is W. M. Ewing, Jr., I reside at Denver, Colorado, and am Credit Manager for the Neusteter Company, which Company is a specialist in women's ready to wear. We have an account in our Company with Major C. A. Shepard. We have records showing shipment of articles to Miss Grace Brandon.

Q. I hand you herewith government's Exhibit 52, and ask you what your records show of your company of any shipment of any article from your company to Miss Grace L. Brandon, which were charged to the account of C. A. Shepard?

A. This is a registry of merchandise sent out-of-town. This particular record shows the deliveries of March 12, 1930. It is an item—

Mr. Class: Just a moment; the defendant respectfully objects to any further testimony by this witness with respect to any articles of merchandise, for the reason that it now appears it was long after the death of Mrs. Shepard, it is immaterial, and does not tend to prove or disprove any of the issues in this cause.

The Court: Overruled. He may answer.

Mr. Class: Save an exception.

(Government's Exhibit 52 received in evidence.) Exhibit 52 shows an item sent to G. Brandon, San Antonio, Texas, value $59.00; an item sent to G. Brandon, San Antonio, Texas, value $35.00. Government's Exhibit 53 handed me shows the $35.00 item entered under March 12th as being a blue chiffon dress. The $59.00 item is a Glen Bogie ensemble.

Mr. Wyman: We desire to offer government's Exhibit 53, in two pages, and also government's Exhibit 52.

Mr. Class: Defendant objects to the reception in evidence, of government's Exhibit 52 and government's Exhibit 53 in two pages, for the reason that all of these exhibits are immaterial, and too remote, and appear on their face that the transaction was had long after the death of Mrs. Shepard, and does not tend to prove or disprove any issue.

The Court: Overruled.

Mr. Class: Save an exception."

(Government Exhibit 53 marked and admitted in evidence.)

Cross Examination.

The ensemble was a sport knitted dress and coat.

A. E. Powell called as a witness on behalf of the government having been first duly sworn testified as follows:

222

My name is A. E. Powell. I reside at Denver, Colorado, and am Office Manager of the Denver Dry Goods Company. We sell ladies' ready to wear articles. We have an account at the store under the name of C. A. Shepard. I have a record showing shipment of articles from our store at the direction of C. A. Shepard to Miss Grace L. Brandon, San Antonio, Texas. Government's Exhibit 54 in two pages are those shipping orders.

Q. What do they show with reference to your store?

A. They show that, on December 30, 1929, a fur piece, a fox fur, valued at $79.50, was shipped to Grace L. Brandon, 2604 South Presa Street, San Antonio, Texas.

Mr. Class: May it please the court, we move to strike this out, for the reason it is too remote and long after the death of Mrs. Shepard, and does not tend to prove or disprove any issue.

The Court: Overruled.

Mr. Class: Save an exception.

(Government's Exhibit 54 marked and received in evidence.)

Our records show these articles were purchased and charged to his account by Major Shepard. Government's Exhibit 54, page 2, shows that that was an evening wrap shipped on December 14, 1929, to Miss Grace L. Brandon, 2604 South Presa Street, San Antonio, Texas, value $79.50, alteration charges, $2.00, total $81.50.

Mr. Wyman: We desire to offer government's Exhibit 54, in two pages.

Mr. Class: The defendant objects to the reception in evidence of government's Exhibit 54, in two pages, for the reason that the transaction was had long after the death of Mrs. Shepard, and was too remote, and does not tend to prove or disprove any issue, and that the same is immaterial.

The Court: It will be received.

Mr. Class: Save an exception.

Government Exhibit 54 shows "sent by Maj. Chas. A. Shepard, address Fitz. Genl. Hosp."

Cross Examination.

It would appear from the records that the evening wrap was returned and a fox fur piece substituted.

J. M. Wainwright called as a witness on behalf of
223 the government having been first duly sworn testified as follows:

My name is J. M. Wainwright. I am a Lieutenant-Colonel of Cavalry, United States Army, stationed at the present time at Fort Leavenworth, Kansas. During the month of July, 1929, I was at Fort Riley, Kansas. I am acquainted with the defendant and first became acquainted with him in December, 1928. I had a conversation with Major Shepard in June or July of 1929 relating to his obtaining a transfer.

Q. Just state the substance of it, as nearly as you can recall?

A. Major Shepard came to my quarters at the time indicated, or about then, and talked to me with reference to obtaining a transfer away from Fort Riley.

Mr. Class: Just a moment, please.

The Witness: Yes, sir.

Mr. Class: At this time, we object to any further conversation with Major Shepard with respect to the matter about which the witness is to testify or intends to testify—expects to testify, for the reason that it is immaterial, occurred after the death of Mrs. Shepard, and does not tend to prove any issue.

The Court: Overruled. Proceed.

Mr. Class: And too remote.

Mr. Wyman: Q. Just go ahead, Colonel.

Mr. Class: Save an exception.

The conversation was in my quarters at Fort Riley and was after June 15th and prior to August 10th. Major Shepard came to my quarters at the time indicated and talked to me with reference to obtaining a transfer away from Fort Riley. He asked me if I had not served for a considerable time as a member of the General Staff in Washington. I told him I had. He asked me my advice as to the procedure to

follow in order to be transferred away from Fort Riley. I suggested the usual official military channels and he indicated he had tried those channels and had met with no success. I then asked him if he had any friends in the Surgeon General's office to whom he might write and he said that would not do any good; he had talked to General Ireland personally. Major Shepard finally said "Have you not a cousin in the United States Congress?" I said I had a cousin, Representative from the State of New York, a member of the Military Committee. He asked me if I thought it would be proper for me to exercise my influence to get him transferred from Fort Riley elsewhere. I told him it was a delicate matter; that ever since my cousin had been in public life I had
224 always refrained from asking such favors but I thought this seemed to be a case where some help would not be misplaced and it was a worthy case, and I would make an exception and ask it. I thought that because here was Major Shepard in my quarters apparently a grief-stricken man and had just lost his wife, and I felt truly sorry for him, and I wanted to help him.

Mr. Wyman: Q. Did he show great evidence of grief while he was there?

Mr. Class: We object to that as immaterial.

The Court: He may answer.

A. Yes, sir, he did; he broke down in tears. He really gave two reasons: he indicated that, under the circumstances, Fort Riley was no longer a place for him to be, because his wife had just died there, and he referred to his qualifications as a Flight Surgeon, which, of course, I knew about and said that he wanted to be where he could be with an Aviation unit which was also perfectly natural because it carried extra pay.

Cross Examination by Mr. Class.

Q. Did you know, at that time, Colonel, that, if he were in close contact, in close contact with the flying field that he would stand a better chance to obtain an assignment or transfer as a flight surgeon?

A. In this way, yes, sir, that, if an officer is any place where he can be assigned to other duty without involving change of station and no mileage, it is somewhat likely he will be assigned to that duty. That is also true throughout the whole service.

Alice McDonald called as a witness on behalf of the
225 government having been duly sworn testified as follows:

My name is Alice McDonald. I live at Fort Riley. My husband's name is Captain McDonald. We were living in Fort Riley when Major Shepard's wife took sick. The Shepards lived in the quarters downstairs under us. While Mrs. Shepard was sick I inquired after her health from both the nurse and Major Shepard. Major Shepard seemed very much concerned about her illness when I talked with him. Two or three days after his wife took sick he told me that she was a very, very sick woman, and he did not think she was going to get well. I did not know Mrs. Shepard very well; I saw her very often come and going. She was an especially good looking woman, very well groomed, very well dressed. She was apparently very fastidious about her personal appearance.

John C. McDonald called as a witness on behalf of
226 the government having been duly sworn testified as follows:

I am the husband of the lady who just testified. Prior to her illness I used to see Mrs. Shepard practically every day. My quarters were just upstairs over the quarters occupied by Mrs. Shepard. I remember of Major Shepard going down to San Antonio in the winter of 1928 or the early part of 1929. I moved into my present apartment shortly after he went down there. I was the Senior officer living in the apartment at that time and in that capacity I had charge of the apartments. Those duties required me to go into the Shepard apartment in this way: when the heat was installed, a thermostat was placed in my quarters and I was obliged to see that the heat was satisfactory to the other occupants of the quarters and I frequently visited the occupants to determine that the heat was satisfactory. I would go into the Shepard apartment in the morning or afternoon or evening, at different times during the day. At those times I would see Mrs. Shepard. I was in the house when Mrs. Shepard died. I went right down stairs. They said Mrs. Shepard was dying. I went to the apartment in response to the report that Mrs. Shepard was dying or had just died. I recall that Major Shepard was particularly grief stricken. I walked with him

from the hallway to the sitting room. I sat with him and attempted to console him.

Jane H. Leader called as a witness on behalf of the
227 the government having been first duly sworn testified as follows:

My name is Jane H. Leader. I live at Denver, Colorado. I am a stenographer, Bureau of Investigation, Department of Justice and was such in March, 1930. I was present and took down the questions and answers that were propounded to Major Shepard by Mr. Caffrey and another D. J. man. They started about five o'clock in the evening, of March 17, 1930, and I was present through it all. Certain questions were asked Major Shepard and certain answers made. I took down the questions and answers.

Q. Did Major Shepard make any objection, in your presence, to answering questions?

Mr. Class: We object to that, that would be a conclusion on the part of the witness. What they said at that time might be proper. Whether he was informed, or whether he made any objection, is a conclusion.

The Court: Oh, I suppose she could tell whether he objected to answering or not.

Mr. Class: We object to this question on that ground; it is a conclusion of this witness.

The Court: All right, sustained.

Mr. Brewster: Q. Did he say anything about answering them or not?

A. Not at the beginning of the statement. There was one question asked him, which he refused to answer.

Q. There was only one which he refused to answer?

A. Yes.

Q. Did he answer questions after that?

A. Yes, sir.

Q. Have you the shorthand notes?

A. I have.

Q. Were they correctly taken down?

A. They were.

Q. Can you read them?

A. I can.

Q. Will you produce them? (Witness produces papers.)

Q. Have you the notes?

A. Yes, sir.

Q. Will you read the questions?

Mr. Class: May it please the court, we interpose a vigorous objection to any further questions from this witness, with respect to any interview with Major Shepard, at that time and/or place, for the reason that there is nothing to indicate to your honor that the conditions under which these questions and these answers may have been made and we want to submit some law on that, if your honor has time to see it. Certainly, it must be primary law that they must lay a proper foundation for any statements that were made under those circumstances, and under such circumstances, before they may be received in evidence. It is a prima facie and a satisfactory showing that is required. It is a legal matter, your honor, whether or not they may be received.

The Court: There is nothing here that they were not properly taken.

Mr. Class: The point is, the district attorney must first show they were properly received, as a predicate.

Mr. Brewster: Your honor, the testimony of this
228 witness, so far, is only that Major Shepard made a statement in answer to questions, on March 17.

The Court: Yes.

Mr. Brewster: That makes for the same foundation as is laid when you put a witness on the stand and ask him if he had a talk with Major Shepard, and what Shepard said, and what he did not say.

Mr. Class: This is a different situation. A casual conversation with some witness is one thing, and—

The Court: Here is a witness who was present between the conversation with the defendant and another man, two other men. Now, she is asked to state what was said.

Mr. Class: Well, there is a very strong statement made by the district attorney, and I think I can show—

The Court: That is all that is before the court at this time.

Mr. Class: I do not propose to sit quiet, and let the district attorney put in some evidence, or offer evidence, which I say is not receivable.

The Court: No.

Mr. Class: And ask your honor to strike it out from the jury's consideration.

The Court: There is not anything here that is different

from any other witness appearing here, whom you might question.

Mr. Class: Oh, yes, I know there is. We should like to take that up, before there is any testimony given by the witness.

The Court: Very well.

Mr. Brewster: No objection to that.

Mr. Class: It is a matter for your honor.

The Court: How long will it take to present this matter, in your judgment?

Mr. Class: I think it might be well to exclude the jury, and make a statement.

The Court: I say, how long will it take?

Mr. Brewster: I suggest, your honor, I put this witness on, at this time, for this reason: That this conversation and this question might be threshed out, and we have now reached that stage where the government is about to close its case, and it is necessary that we look over the loose ends. Of course, there will be other witnesses, there will be one witness of considerable length in the morning, and this witness, and I suggest that, when a recess is taken, that it be until tomorrow morning. We will close our case tomorrow.

Mr. Class: Do I understand that General Brewster is now ready to take up the matter of the question of whether it is proper to receive this conversation or not?

The Court: Yes, that is what I understood, that
229 he wanted to agree to that; and, if I get it, that we excuse the jury now, and the jury be not required again until tomorrow morning is that what I understand?

Mr. Brewster: Yes.

Mr. Class: That is agreeable with us.

The Court: You have no other witnesses whom you want to put on this afternoon, before we go into this matter?

Mr. Brewster: No, I have not.

Mr. Class: We would like to have this passed upon by your honor.

The Court: Yes. Gentlemen of the jury, under the statements of counsel, we will perhaps take no more evidence this afternoon. You will be excused until 9:30 tomorrow morning.

Mr. Kagey: I think the practice has been for counsel for the government to put his witnesses on, and show the court the manner in which the statements were made. It does not make any difference how it is arrived at, but, whether or not

the defendant is in custody, the constitutional measures should govern.

Mr. Brewster: The defendant is in custody.

Mr. Kagey: A question arose in the federal court, in 168 United States—

The Court: Maybe you better state some of the facts. Was the defendant in custody when the statement was made?

Mr. Class: Yes, your honor. The situation is different, your honor,—

The Court: There is nothing here to show.

Mr. Class: I will very briefly outline the situation, as I understand it: On March 17, of this year, Major Shepard was on duty in the Medical Corps at Fitzsimons General Hospital, near Denver. Along in the afternoon, I think it was along between four or five o'clock, he was summoned to the office of the commanding officer, at that time Colonel Halloran. Colonel Halloran introduced him, and informed him that two gentlemen were present that wished to interview him there, have some possible transaction with him.

The Court: He was on duty there as an Army officer at the post?

Mr. Class: On duty at that time at Fitzsimons, which, as your honor knows, is for the treatment of tuberculosis, and a general hospital. He accompanied Mr. Caffrey and the other gentleman, I do not know his name, but he was a government agent, to the Federal Building in Denver, was taken to some room there in the Department of Justice, either in the District Attorney's rooms, or the United States Marshal's rooms, or quarters, in that large building, and some statements were made to him, practically, that they were investigating the death of his wife, and, without disclosing to the major at that time that he was under the slightest suspicion, they
230 made some very nice statements; did not ask him, but that, if he wanted to tell the truth about it, and he said, "Yes, go ahead, what do you want to know?"

The interview was prefaced by some statement, I do not know just what; at least, the burden was on the district attorney to prove it. At least, he was not informed at the beginning, that he was even under suspicion, and, as the interview grew, these detectives, Caffrey and this other man, began to get very personal about it, much to the major's surprise, and were charging him, or, at least, making remarks which your honor, myself and Mr. Kagey here would under-

stand we were under suspicion right then and there, but it took quite a while for Major Shepard to get it through his head.

The Court: He was not in custody then? I thought you said a while ago he was in custody?

Mr. Class: He was in custody to that extent, that these government detectives had him in tow, in that building, and, as the interview grew longer, it waxed pretty hot before they got through, and there were some statements made that he was a liar, and this gentleman turned him in, and the next thing he knew he was in jail.

The Court: He was arrested right then?

Mr. Class: He was arrested that night, without any dinner, and taken to the county jail in Denver.

The Court: By these men?

Mr. Class: And turned over to the county jail in Denver, where he remained about six weeks, until released on bond, and restored to duty.

We say circumstances should first be shown by the district attorney to satisfy your honor that the major was fully advised of his rights, and made the confession freely and voluntarily without coercion, without any threats, no knowledge of the nature of the charge, and without any promises of reward. Your honor knows the cardinal principles of those things. Now, the district attorney may say that this did not go to the extent of a confession, although I understood General Brewster to say, in his opening statement, that the defendant made what amounted to a confession.

The Court: I must have overlooked that.

Mr. Class: He said something about a confession. This is too serious a case to permit any testimony under those circumstances to be in, without first laying the foundation. In addition to that, if your honor please, Major Shepard had no lawyer, was taken back to the Federal Building the very next morning, and I might say, at that time, that they took him over to the county jail and the warden wanted to know if they could put a man in jail in uniform, and they waited until the jailer brought down his civilian clothes before the jailer consented to put him behind the bars.

The Court: That was the next day?

Mr. Class: No, 3 o'clock in the morning, that same night. Then, the next day, these officers conducted the march to the

Federal Building, and, by that time, the statements had been trasncribed by Miss Leader, saying to the major, "I want you to sign this." "Oh, no, I will not sign that." "Why not?" "Is it not true?" "No, there is some error, there is some mistake. I got to thinking it over during the night, and I came to the conclusion I have made some statements not exactly correct. Further I will not sign anything until I see some attorney."

Taking into consideration, if the court please, Major Shepard being for a number of years an Army officer, for a number of years like a fish out of water, and we say not one of those statements should be received in evidence; and it was the day before that, I think, before I was called into the case, some such matter. We say the burden is on the district attorney, under those circumstances, and particularly when a man is charged with the most serious offense known to the criminal courts. Every safeguard should surround the major, and try the case by the testimony given by witnesses from the stand in this courtroom, under the court's super-
231 vision. That is our position.

Mr. Brewster: He was not arrested by these men, and never taken into custody by these men.

Mr. Class: He was afterwards arrested by the United States Marshal.

Mr. Brewster: They did not pretend to arrest him.

Mr. Class: They arrested him that night, may it please your honor.

The Court: These men?

Mr. Class: These men, or at their instigation, and the fugitive warrant, may it please your honor, under which he was confined, was sworn to by R. J. Caffrey, in which they say he was a fugitive from justice.

The Court: What was the time of that interview?

Mr. Class: About 5 o'clock, and he went without dinner.

The Court: How long did it last?

Mr. Class: Several hours.

The Court: How long?

Mr. Kagey: Five o'clock until eleven. Then he was put under arrest and put in jail.

The Court: He was told by them he was under arrest?

Mr. Class: At that time.

The Court: That was the end of the interview?

Mr. Class: He was in tow, and in custody, as we say, or

Mr. Caffrey, and we have told you he was technically, the technical means by which he was in prison—

The Court; I mean, in jail?

Mr. Class: Although we say he was imprisoned while he was in the Federal Building, but there was a fugitive warrant sworn to by Mr. Caffrey, that he was a fugitive from justice.

The Court: Have you any statement of facts?

Mr. Brewster: Why, yes.

The Court: Will you tell me, then?

Mr. Brewster: Mr. Caffrey went out there and asked this man to come down, and then, when they called Miss Leader in, asked him if he understood his constitutional rights. He said, "I do." He was asked if he made the statement willingly and freely, and he said, "I am." He wanted to make it because he wanted to tell the truth. That was his reason: He wanted to state it, and then he was asked questions. The next morning, they prepared it, and asked him if he wanted to sign it, and to make corrections, and he said there was some—

The Court: He was placed under arrest that night?

Mr. Brewster: Yes; and he said there were some changes he made, or wanted to make, and they handed him a pen and suggested whatever changes he wanted to make, and he did not do it, and he did not sign it. We do not claim it was a confession of what he said, but Miss Leader's notes will show what he said.

Mr. Kagey: In this case, the court held the rule was the same.

Mr. Class: Constitutional rights are invaded every day. Lots of people do not know what they are.

Mr. Brewster: I should like to have Miss Leader read the notes to the court, and see what was said.

The Court: Yes, I think I better hear it.

Mr. Kagey: There was not anything typed at the time. This was simply taken in shorthand?

Mr. Brewster: This is shorthand. Yes, they were typed.

Mr. Kagey: They were typed? Use that.

Mr. Brewster: I want the shorthand notes. You may claim they were typed wrongly.

Mr. Class: We will do whatever thing is necessary to protect the rights of Major Shepard.

The Court: I am expecting you to do that. I shall not be surprised.

Mr. Class: You will not be disappointed.

Mr. Brewster: Q. Read the first.

A. (Reading)) This statement, made by Major Charles A. Shepard, to special agent R. J. Caffrey, in the offices of special agent-in-charge, S. J. McAfee, 328 Post Office 232 Building, Denver, Colorado, taken in shorthand by Jane Leader and transcribed by Jane Leader. (Witness Jane Leader, reading.)

Questions by Agent Caffrey:

Q. Your name is?

A. Charles A. Shepard.

Q. Just state your official position.

A. Major Medical Corps, United States Army.

Q. Where stationed?

A. Fitzsimons General Hospital.

Q. How old are you?

A. 59 in October, 1930.

Q. Have you ever been married?

A. Yes, sir.

Q. When were you married the last time, and who did you marry?

A. I think it was in 1916, she was a divorcee,—I cannot think of her husband's name—McCoskey.

Q. Major, have you been advised relative to your constitutional rights in making this statement?

A. Yes, sir.

Q. Do you understand them?

A. Yes, sir.

Q. And you make this statement freely and voluntarily?

A. Yes, sir.

Q. Why do you make this statement?

A. You are asking me to make this statement—for some investigation.

Q. Do you make it because you want to tell the truth?

A. Yes, sir, absolutely.

Q. Can you state and give the dates of any time—

Mr. Brewster: That is the question about the case, from there on?

The Witness: Yes, and he then asked about his wife's illness.

Mr. Class: Right on the face of it, may it please the court, it shows Major Shepard was not under charge, or even a

suspicion that he had anything to do, unlawfully or wilfully, with the death of his wife. It might have been something to do with insurance, as far as this record shows, or was concerned. Here was a trap laid by these men. Let us have this in the court room, not in the Federal Building in Denver, and find out what they say.

The Court: Yes, certainly. Q. What was the date of this conversation?

A. (By the witness.) March 17, 1930.

Q. The examination started about 5 o'clock.

A. Yes.

Q. The examination went on until 11 o'clock that night?

A. About that time.

Q. He left there, and was the major in custody when he left?

A. Yes, I think he was.

Q. Who came and took him?

A. The United States Marshal.

Q. The United States Marshal came?

A. He was in the room off and on.

Q. He was in the room off and on, and later was called, or came?

A. Yes.

The Court: That is all of that. As far as this goes, it does not show that the defendant's rights were invaded. That is the way it appears to me, offhand. Now, maybe, if you can bring it within some of these authorities, I should be glad to have you bring some of those authorities, for I should like for you to examine the authorities.

Mr. Class: He must know of what he stands charged, but here, on the statement this witness has made, he did not even know he was under suspicion, to say nothing about a charge.

Mr. Kagey: This is a case very similar, the Bryan case.

Mr. Class: The fact that he was not technically in custody, I mean, the United States Marshal, he was taken into custody—

The Court: The difference in this case cited here and the case at bar, it seems in this case cited here that the defendant was arrested and was in custody at the time he made the statement. In the case at bar, he was not arrested. He could have gotten up and walked out, at any moment he desired.

Mr. Kagey: We will make a showing on that.

The Court: Very well, proceed. If you make a showing he was in custody, I suppose that would be different.

233 If this is the authority you stand on, you are not arguing the fact in this case.

Mr. Kagey: I concede we are not arguing the fact yet.

The Court: I suppose the defendant has a right to show.

Mr. Class: If there is any doubt about it, it should be resolved in favor of the defendant.

The Court: Unless you have some authority; I am judging from the authority submitted to me. The statement you have made does not fit the facts here.

Mr. Class: The witness testified the marshal was on the job in and out all the time.

The Witness: I beg your pardon, I did not mean during the time the statement was being taken. You asked me if he was there during the time the statement was taken. After the statement was through, we were standing around the office, and I was talking to Mr. Caffrey, and the other agents, and the marshal came in.

The Court: Q. Had the marshal been present?

A. He was not present at the time the statement was taken.

Q. And he had not been present at any time?

A. No, in Mr. McAfee's office, just Mr. McAfee and Mr. Caffrey and Major Shepard and myself present at the time the statement was taken.

. . . . . .

Mr. Class: We will call Major Shepard, and very briefly examine the major—

The Court: Yes.

Mr. Class: —with regard to the circumstances then and there, but reserving at this time, if your honor please, the privilege of the defendant to refuse to testify.

The Court: Oh, well, the jury is not here.

Mr. Class: Well, I say, we want that understood.

The Court: Oh, certainly.

Mr. Class: We are not waiving that.

The Court: Oh, certainly.

Mr. Class: Major, will you take the witness stand?

Charles A. Shepard called as a witness on his own
234 behalf having been first duly sworn, testified as follows:

My name is Charles A. Shepard. I am the defendant in this case. I am a major and commissioned officer in the service of the United States Army stationed at Fitzsimons General Hospital near Denver and was there in the month of March of this year and on March 17th. I received a message that my presence was desired at the office of the commanding officer. Colonel Halloran telephoned me himself. I went over to his office. Colonel Halloran introduced me to Mr. Caffrey and somebody else, I do not remember his name. The colonel said these two men wanted me to go to town with them, to investigate something or to talk about something, did not say what it was. I went and Mr. Caffrey and the other gentleman accompanied me. They did not say anything.

Q. What was said by anyone?

A. There was nothing said; we walked into a room and another gentleman there besides Mr. Caffrey brought in a stenographer and started to ask me these questions, which the stenographer has testified to.

The interview lasted several hours. Before the interview started, when they began to question me, I asked them how long it was going to take and they asked me why, and I said I had a dinner engagement at the post, and it was only right that I should inform my hostess if I could not be present. They said it would take several hours before they were through with me.

Q. Did you telephone?

A. I did, yes, sir.

Q. After this examination proceeded did you learn at any time that you were under suspicion with anything wrong in connection with the death of your wife?

A. As the questions developed, I did, yes. It must have been an hour or so.

The first thing that brought it to my mind that raised a suspicion I had anything to do with this matter, they began to ask questions about what I thought the cause of death was, or words to that effect, and about bichloride of mercury, and prescriptions that I had written.

Q. Anything about this girl down in Texas?

235 A. Yes, McAfee made the statement that "she has turned you down", or words to that effect, "the same as they all do when they get in a jam".

Q. Anyhow did you understand, at that time that you were under suspicion?

A. I did.

Q. Or had some connection with the wrongful death of Mrs. Shepard?

A. I did.

That was about an hour or an hour and a half, I cannot tell you the exact time, sir.

Q. What was the attitude or demeanor of Mr. Caffrey or Mr. McAfee, or anyone else who was applying this inquisition at this time?

Mr. Brewster: We object to that.

Mr. Class: All right; propounding the question is better.

A. It was all right, at first, until they began to tell me I was lying.

Q. Who said you were lying?

A. Caffrey.

Q. More than once?

A. Yes, he did say it more than once.

I telephoned to the chaplain to bring me down some civilian clothes before I was placed in the County Jail at Denver. They had some difficulty in securing the District Attorney I believe in Topeka in securing the warrant and they kept me there. The first one to apprise me that I was under arrest was the marshal when he came in and said, "I arrest you for the murder of your wife." That was about eleven o'clock. I did not know the marshal up to that time. I do not recall seeing him around there. After remaining in jail that night I was again taken to the Federal Building about nine o'clock the next morning. I think it was Marshal Callen who took me. I saw Mr. Caffrey at that time. He handed me this statement and he wanted me to read it, and I did, and I laid it down, and he said, "I want you to sign it," and I said, "I cannot sign it." He said "You would have signed it last night." I said, "Well, I have been thinking things over during the night, I know I have made statements there that are not true." He says, "Let us change them now." I said, "No, I will not change them now, and I will not sign anything until I can see an attorney." I never did sign it. There are some statements in there that were not correct. I had a hard day, taken down by them right afterward, and naturally I was upset by
236 the questioning. There was no further attempt made by Mr. Caffrey or any of the authorities out there to

have any further statement made after I told them I wanted an attorney. I think it was the 19th or 20th that I called you (Mr. Class) into the case.

Cross Examination.

He remembers what the statements were which he claims were incorrect.

I knew the questions being asked me and the answers I was making at the time.

Q. They did ask you if you understood your constitutional rights?

A. They did.

Q. You said you did?

A. I was not thinking anything about what constitutional rights were, at that time.

Q. What did you mean by the answer, then?

A. Beg your pardon?

Q. What did you mean by the answer, then?

A. Well—

Q. What did you mean by the answer, you did know?

A. I do not know what I did mean, because, as I say, I was not thinking anything about constitutional rights.

Q. You kept on answering questions, when you thought they suspected you?

A. I did.

Q. Now, you had been advised about your constitutional rights?

A. Yes, Mr. Caffrey said something.

Q. You told the court, a minute ago, they walked in there, and, without a word, began to ask you questions. Caffrey did say something about constitutional rights?

A. The questions given by the stenographer here were asked me first, and, in that, they asked me if I had my constitutional rights explained.

Mr. Caffrey advised me of my constitutional rights.

Q. You were asked if you understood them, and you said you did, did you not?

A. Yes, sir.

Q. And you were asked if you made the statement freely and voluntarily and you said you did?

A. I did.

Q. And that was true?

A. Yes.

Q. What?
A. It was.

Redirect Examination.

By Mr. Class: Q. Do you, as a matter of fact, know your constitutional rights, and did you, at that time?

A. No, I had not paid any attention to it. I had never been in court, and that question was never asked me before.

Q. Were you ever arrested in your life before this matter?

A. No, I have never been arrested before.

Mr. Class: I think that is a presumption on the part of this witness, or any other witness, nowadays, to state whether they know their constitutional rights or not. We submit, may it please the court, the testimony of this witness, together with the circumstances which I have related, and which will be admitted, do not permit the reception in evidence of any statements made by this witness under those circumstances, and we respectfully insist that this lawsuit be tried in this courtroom under sworn testimony by witnesses from the witness chair, and not otherwise.

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The Court: Have you anything further to offer? Have you anything further to offer? Have you any further authorities you want to submit?

Mr. Kagey: I might have some, judge; I probably shall have, but this came up, and I just had to grab this, and grab it quick.

The Court: Maybe you can get me something by 5 o'clock.

Mr. Kagey: I think so.

The Court: I should be glad to have any authorities you have, that would tend to throw any light on the subject. I might tell you now, I am seriously in doubt whether you have made any showing to prevent this testimony coming in.

Mr. Kagey: Do I understand your honor's position in a matter of this sort, that the burden is on the defendant?

The Court: Under the statements made here, you put the burden on yourself.

Mr. Kagey: I do not think the burden shifts on a constitutional question.

The Court: I want some authorities that will help me to see your side of it.

Mr. Class: You should resolve the doubt in favor of the defendant.

The Court: My doubt is whether you have made a showing that could come under the authorities, such as you cited.

Mr. Class: We will get something along that line in the limited time we have. If we do not get it by 5 o'clock, we will get it this evening.

. . . . . .

Mr. Brewster: No, in view of the witness's testimony here that he made this, even now at this time, that he did make it freely and voluntarily, that ends it. I asked him now if he made it freely and voluntarily, and he said yes.

The Witness: They asked me if I was willing to make this. I said yes. I did not know what they were talking about.

The Court: Q. You knew they were talking about the death of your wife?

A. After that.

Q. Yes, sir.

A. They asked me, "Are you willing to make a statement?" I said, "I am."

Q. Did you interrupt them, at any time, and tell them you were not willing to make any statement?

A. No.

Q. You never made that statement, at any time?

A. They said, "Do you want to tell the truth?" I said, "Yes." I did not realize, at that time, what the whole thing was about.

Q. You did not realize—

A. That I was under suspicion.

The Court: That is all.

Mr. Brewster: Q. Would any of your answers have been different?

Mr. Class: He has already answered that question.

A. I probably would have had a lawyer.

9:30 o'clock A. M., Thursday, December 11, 1930.

The Court: You gentlemen did not furnish me with
238 any authorities.

Mr. Class: We have nothing further to offer, if your honor please.

The Court: Let me see, just what was the objection?

Mr. Brewster: Objection to the introduction.

The Court: Objection overruled.

Thereupon the attorneys for the defendant requested a copy of the transcribed notes of Jane Leader and the District Attorney announced that it would not be offered in evidence at this time, so the court made no order that defendant's attorneys be furnished with a copy of the transcribed evidence. The court, stating he would make no order until the evidence is offered.

Grace Lee Brandon called as a witness on behalf of
239 the government having been first duly sworn testified as follows:

My name is Grace Lee Brandon. I now live at San Antonio, Texas, and have for about five years. At present I am a stenographer, civil service of the United States Air Corps at Brooks Field. Brooks Field is approximately three miles from the suburbs of San Antonio. I have been working at Brooks Field in the same position from about July 25, 1928, and am still engaged in that position. In 1928 my parents were living near Midland, Texas. They now reside at Comanche, Texas, near Dallas. They live on a farm. About the first of November, 1928, I moved over to 2604 South Presa Street to a boarding house run by a Mrs. Charles M. Wylie, Sr., and boarded and roomed at that place. I am acquainted with C. A. Shepard. I met the doctor (Shepard) about six or six thirty on November 1st to the best of my remembrance and knowledge of 1928. The defendant, Shepard, was boarding and rooming at that place at the time I came there and had been from September 1st. It was at dinner time in the evening that I first met him. I was introduced to him at the same time as I was to the rest of the boarders and roomers at Mrs. Wylie's. I had a conversation with Major Shepard that evening.

Q. Will you please state what that was?

A. I do not remember the exact words, but, in substance, I think all of them, except Major Glenn, who was the accused's roommate—well, anyway, he roomed with him. I believe, and all of them except him had asked me for an engagement to go to a show, or dinner, or some other place, except Major Shepard, and, when the rest of them got through, it was this, in substance, not his exact words, but as well as I can remember, it was something like, "I do not

suppose you care to go out with these lieutenants; would you like to go with me sometime?" I said, "I might, and it was nice of you to ask me."

Q. Later on did he have any further conversation with you about your accompanying him any place?

A. Well, quite often, yes.

It was two or three days later perhaps after the first evening that he brought up the subject again. He just asked me when I was going with him, or if I would like to go to dinner and dance or something like that. It was about two or three days approximately after I met him that
240 I first accompanied him any place at his request. I knew the first time that I went out with him that Major Shepard was married, but I asked the landlady, Mrs. Wylie's advice, about going out with him and asked her what she thought about it. The first time I went out with him we went to dinner and to a show—the movies, some place. At that time he asked me how I would like the Army, and he told me what he considered the interesting parts about the Army, and he intimated he and his wife were not so congenial, and had not been for a number of years. He insinuated that they—

The Court: Yes, just state as nearly as you can what he said.

A. (continuing) I told you I did not remember the exact words, and, if you cannot let me say, in my own words, what he gave me to understand, I cannot make a reply—

Mr. Kagey: I object to the speech to the jury.

The Witness: I cannot make a reply—

The Court: Proceed.

Mr. Wyman: Q. Did he tell you as to whether or not his wife and he had been getting along well, or not, in the last few years?

Mr. Kagey: Once more, we object to this, as leading and suggestive, and counsel attempting to place the words in the witness's mouth.

The Court: Oh, that is not a fair statement; that is not a fair statement.

Mr. Kagey: Well, then, it is leading and suggestive.

The Court: Just state the conversation, as nearly as you can, Miss Brandon.

The Witness: I do not know what to say.

The Court: Just state, as nearly as you can, what he said. I think we can go ahead now.

A. (Crying) Well, ask me the question again, and let me make my reply in my own words.

The Court: Yes, just answer the question.

Mr. Wyman: Yes.

The Court: Just read the question.

(Last question read as above recorded.)

A. He said they had not—

Mr. Wyman: Q. He said they not—

Mr. Kagey: Did the court overrule my objection?

The Court: Yes.

Mr. Kagey: We note an exception.

He said they had not gotten along well for the last five or six years, because of her drinking and going out, or flirtations, or affairs with other men and did not speak to each other at home, and they were keeping up a congenial appearance in social functions just for his rank and reputation's sake. He said he could have gotten a divorce four or five years ago but he had no reason or motive for getting one, and he did not care to be subjected to the unpleasant-
241 ness of going through the procedure of getting a divorce and the criticism to which everyone is subjected when they get one—or the criticisms, regardless of the circumstances. It was probably three or four days after she went with Major Shepard this first time that she went out with him again. From that time until Major Shepard left I accompanied him various places two or three times a week. Either he and I went out alone or else there was a Dr. Sayre who was a First Lieutenant in the Reserve Corps of the United States Army who was also taking the same course of Flight Surgery as Doctor Shepard and a girl friend of his, the four of us went out together several times. Major Shepard left San Antonio about December 4 or 5, 1928. During the time after she met him his relations with his wife was discussed a number of times; she did not remember how many. The substance of those conversations would be about the same as related. It was either Thanksgiving or Sunday after, it was the latter part of November, she took an automobile trip with Major Shepard to Neuvo Laredo into Mexico. Doctor Sayre and a friend of his accompanied them. During this time between the time I met him and the time he left San Antonio he bought me

candy and several times bought me carnations, two or three times when we were going out somewhere to a comic opera, I believe, it was, and to a dance. The first time he bought me any jewelry of any kind was a few days after we made this trip to Laredo when he bought me a little sterling silver bracelet. It is in this suit case right here.

Mr. Brewster: Miss Brandon, will you get down and find your bracelet?

A. It is wrapped up in the tissue paper.

Mr. Kagey: Just a moment; we object to the witness talking to anybody without being asked questions, in the presence of the jury.

Mr. Brewster: We submit, your honor, it is absolutely unfair.

The Court: Do not make those kinds of statements. The only suggestion made was to tell Mr. Wyman where to find these things.

Mr. Kagey: That is all right. I would like to know what is said. We except to the remark of the court.

Government Exhibit 55 handed me is the bracelet he bought me at that time and as I recall it was a few days after Thanksgiving, 1928. (Government Exhibit 55 marked and received in evidence.)

Outside of flowers and candy I do not recall now
242 any other present he gave me while he was in San Antonio in 1928. During that time he was there in San Antonio in 1928 we had conversation in which he used words of affection to me. He told me that —well, he told me he loved me, and that he had never met anyone like me. I say, he said he loved me, and he never met anyone just like me, and, on the trip to Laredo, we were across the border over there, and I wanted to see a bar, I had never seen one before, so we had one little glass of port wine, and he also had never seen any of that before, and he asked me, if he got a divorce, would I marry him, and I said I would, and he said we would drink to that, and made much about plighting our troth, or something to that effect.

After that we had other conversations in which the contents were substantially the same. That was before he left San Antonio. It would be on practically every occasion I was out with him.

Q. At the time he left San Antonio was there a general

understanding between you that you were engaged to be married?

Mr. Class: Just a moment; we object to any conclusion as to the understanding; let us have the words, the substance is not enough.

The Court: Very well, give the conversation, what was said by you and him.

A. Well, we were, of course, not engaged; there was not really any understanding, only as I say he asked me if I would marry him if he got a divorce. He asked me if I would, and I kept saying I would, and he kept telling me how much he loved me, and asked me a number of times to write him, and I promised I would—well, that is about all.

After the Major left San Antonio I corresponded with him. He instructed me to mail letters I wrote him to a Post Office Box in Junction City, Kansas. Major Shepard gave me a Christmas present for that Christmas in December of 1928. It was a dresser set of brush and comb and manicure and mirror. Government Exhibit 56 shown me is that gift which I received by insured parcel post. (Government Exhibit 56 marked and received in evidence without objection.) When the package arrived the powder jar—the large amber colored jar and the top to the perfume bottle was broken and I took those two pieces to the inquiry section at the Post Office in San Antonio and asked them to make an adjustment. The pieces were replaced. I believe Major Shepard spoke to the people whom he purchased the gift and got them to order the pieces.

Q. Now, Miss Brandon, if you can remember, when
243 was the next time that Major Shepard sent you any presents, of any kind?

A. Do you mean, besides candy and flowers?

Q. Yes. Well, now, I will ask you—

Mr. Class: Let us have all the candy and all the flowers.

Mr. Brewster: We object to this kind of thing.

The Witness: Your honor, I cannot remember.

The Court: The government will present its case. If you have objections to make to the offers of evidence, gentlemen, make them to the court.

Mr. Class: Very well, your honor, but this witness is going to skip something.

The Court: The government will present its case, and I hope counsel may understand that.

Mr. Class: Very well.

The Court: Proceed, please.

Mr. Class: Save an exception.

During this time he was sending me candy and flowers at different times and I do not remember the exact times and the exact dates. He was sending me candy and flowers at various times from the time he left. The next time he sent me a gift outside of the candy and flowers was a ring for my birthday on February 23, 1929. It was a yellow gold ring, mounted with a very pale colored amethyst stone with a tiny pearl on each side of it. Government Exhibit 57 handed me is that ring. (Government Exhibit 57 marked and received in evidence without objection.) The next gift he sent me was a German Roller Canary, in a cage, but I believe before that time, he sent me a check for $10.00, ten or fifteen dollars, for ice skates, his personal check. I do not have those skates with me. With the bird I received a cage and a supply of food for the bird and the bird itself. The bird is in San Antonio now. The next gift he gave me outside of flowers and candy was a necklace; I do not know whether it was gold or what it was; supposed to be quite old; it was carved and very peculiar looking. It was supposed to be an antique necklace he gave me in the early part of July, 1929. Government's Exhibit 58 handed me is that necklace.

Mr. Wyman: The government desires to offer in evi-
244 dence Exhibit 58.

Mr. Class: May it please the court, the defendant objects to the reception in evidence of government's Exhibit 58, being this necklace, for the reason that it is immaterial, the witness having testified it was presented to her sometime in July, after the death of Mrs. Shepard, and it does not tend to prove or disprove any of the issues in this case.

The Court: July, 1929?

Mr. Class: Yes, your honor.

The Court: It will be received.

Mr. Class: Save an exception.

Major Shepard personally presented me with this necklace I have testified about here. I think it was the first day of July, 1929, on Sunday and it was the evening of that Sunday. While he was in San Antonio at that time I do not remember of any other presents given me outside of candy and flowers. The next present he gave me was a diamond set in platinum the first part of October, 1929.

Mr. Class: The defendant objects to any testimony with respect to this, in October, 1929, or any time after the death of Mrs. Shepard, for the reason it is immaterial, and does not tend to prove any issue.

The Court: Overruled.

Mr. Class: Save an exception.

While Major Shepard was there in July of 1929 I had a conversation with him about the ring I have just testified about, he mentioned that he would have brought the ring with him when he came down, only he could not afford it right then and he would send it to me within the next two or three months. I had a conversation with him at that time relative to marriage. I cannot tell you the exact date; he was there about three or four days, from the 1st to the 3rd of July or something like that; it was sometime while he was down there.

Q. Just state the substance of that conversation.

A. He first asked me to marry him while he was down there, but it was so soon after his wife's death, naturally I knew it would create a scandal, and ruin his social standing, and have nothing more in the Army, don't you know, and I would not agree to do that, so then, he wanted to know how soon I would marry him, and I said, not before a year, or a year-and-a-half, because, for his sake more than anything else, people would criticize him for it; it would look terrible, and I did not want them to say anything bad about him.

Mr. Class: Miss Witness, be confined to what was said.

The Witness: I said that.

The Court: She is testifying to what the defendant said at that time.

Mr. Class: All right.

We did not set the exact date for the wedding at
245 that time; we set August, 1930, but we did not decide on the exact date, at that time, I do not believe. Or, perhaps in September or October. I did later get this diamond ring. The next presents I received from Major Shepard outside of the candy and flowers, Major Shepard gave me a crystal necklace, crystal bead necklace, and also a pearl necklace, Delta pearls, I believe you call them. This was the last two or three days of October, 1929, and November, 1929. Government's Exhibit 59 handed me is the pearl necklace Major Shepard gave me the 29th or 30th of October, 1929.

Major Shepard was in San Antonio at that time. He gave it to me while we were driving from Fort Worth, Texas, to San Antonio, Texas.

Mr. Wyman: The government desires to offer Exhibit No. 59 in evidence.

Mr. Class: To which the defendant objects, for the reason it is immaterial, the transaction took place long after the death of Mrs. Shepard, and does not tend to prove or disprove any issue in this case, and, at this time, we make the same objection to Exhibit 60.

The Court: It will be received.

(Government's Exhibit 59 marked and received in evidence, and made a part hereof, being a necklace.)

Mr. Wyman: Q. I show you herewith government's Exhibit 60, Miss Brandon, and ask you if this is the necklace that you refer to that he gave you?

A. That is the necklace Major Shepard gave me at the same time he gave me the exhibit just presented just preceding this one.

Q. That was during the time he was in San Antonio?

A. As I say, we were driving from San Antonio, Texas, to Fort Worth, Texas.

Mr. Wyman: The government desires to offer in evidence Exhibit No. 60.

Mr. Class: Object for the same reasons.

The Court: Yes, it will be received.

Mr. Kagey: Save an exception.

The Court: Exception allowed.

Major Shepard also gave me Government's Exhibit 61 handed me. To the best of my knowledge and remembrance he gave it to me at the same time he gave the two preceding exhibits and he also stated he had purchased that at the Post Exchange at Brooks Field while he was in San Antonio, in November, 1928, with the intention of giving it to me as soon as he could get attached to the Air Corps. It has the Air Corps emblem on it and he wanted to give it to me as soon as he was transferred to the Air Corps. (Government's Exhibit 61 is a blue bracelet with the Air Corps emblem on it.)

Mr. Wyman: The government desires to offer in evi-
246 dence government's Exhibit No. 61.

Mr. Class: We object, for the reason it is immaterial, and a transaction had after the death of Mrs. Shepard, too remote, and could not prove or tend to prove any issue.

The Court: Overruled.

Mr. Class: Save an exception.

Major Shepard was in San Antonio at that time about ten days or two weeks, the latter part of October and the first of November, 1929. He made arrangements while he was down in San Antonio at that time, November, 1929, for the purchase of a Buick Coupe for me and then he sent me for Thanksgiving, 1929, a gold plated mesh bag by insured express. (Government Exhibit 62 offered in evidence.)

Mr. Wyman: The government desires to offer in evidence Exhibit No. 62.

Mr. Class: The defendant objects to the reception in evidence of government's Exhibit 62, for the reason it is immaterial, too remote, the transaction was had long after the death of Mrs. Shepard, and does not to prove or disprove any issue in this cause.

The Court: It will be received.

Mr. Class: Save an exception.

The next present he gave me as near as I can recall was about November 22, 1929, I got a little pearl necklace, three strand with crystals inserted therein. Government Exhibit 63 handed me is that necklace I have referred to.

Mr. Wyman: The government desires to offer in evidence government's Exhibit 63.

Mr. Class: The defendant objects to the reception in evidence of government's Exhibit 63, for the reason it is immaterial, the transaction was had long after the death of Mrs. Shepard, and too remote in point of time, and does not tend to prove or disprove any issue.

The Court: It will be received.

In November of 1928 when he was down there where I first met him he mentioned that he disliked to see me going places on public conveyances and wished he were financially able to buy me a car at that time, and it was mentioned at various times in letters; it was not definitely mentioned, just spoken of, just wished that he could, until November, 1929, when he advised me he made the arrangements about it. The next present he gave me was between the latter part of October, 1929, and Christmas of 1929 when he mailed me or gave me a long string of what the Major called Japanese
247 pearls. Government's Exhibit 64 handed me is that necklace of Japanese pearls to which I have just referred.

Mr. Wyman: The government desires to offer in evidence Exhibit 64.

. . . . . .

Mr. Class: Very well. Defendant objects to the reception in evidence of government's Exhibit 64, for the reason it is immaterial, a transaction had after the death of Mrs. Shepard, too remote, and tends to prove nothing.

The Court: It will be received.

Mr. Class: Save an exception.

The next present I received outside of candy and flowers was at Christmas, 1929. I received several presents for Christmas and for New Years and I do not remember at this time which ones were given at New Years and which for Christmas, but I received a fitted week end case of brown leather, and I received a black, silver pointed fur piece, that was mailed from the Denver Dry Goods Company, I believe, in Denver, Colorado. In fact, I believe all of them were mailed from there in the stores with his card in a sealed envelope. Then he sent me a fur stole, and an evening wrap of black velvet. I had one exactly like it, the one he sent except it was dark blue and I did not care to have two of the same style and same color and I asked if he would kindly change it for the fur piece and he did that, and I received a diamond dinner ring with three small diamonds in the center and two tiny ones on the side, and had some sapphires around the diamonds, set in white gold, which was purchased from the Hertzberg Jewelry Company, from Mr. Murray. I went down and called for it; he told me he had made arrangements for it, to go down and get it. Government Exhibit 65 shown me is the week end case I have just referred to.

Mr. Wyman: The government offers Exhibit 65.

Mr. Class: The defense respectfully objects to the reception in evidence of government's Exhibit 65, for the reason that it is immaterial, it happened long after the death of Mrs. Shepard, to wit, on Christmas or New Year's of 1929, or 1930.

It does not prove or tend to prove anything, too remote
248 in point of time.

The Court: It will be received.

Mr. Class: Save an exception.

Government Exhibit 66 shown me is the dinner ring about which I have just testified to receiving from Major Shepard.

Mr. Wyman: The government desires to offer in evidence government's Exhibit 66.

. . . . . .

Mr. Class: Defendant excepts to the reception in evidence of government's Exhibit 66, immaterial and too remote in point of time, does not tend to prove any issue.

The Court: It will be received.

I think I lost the fur piece. When Major Shepard spoke to me definitely about making arrangements to get me an automobile, I told him that I could not afford, on my salary, to keep up an automobile, and he said he would pay all expenses on the automobile and that he wished I would write and tell him how much it was, and he would mail me a check for that amount, and he did that—well, I do not remember just when he sent the checks, but he sent me checks in the exact amount for the expenses, in December and January and February, I believe that was all. I do not recall the exact amounts but approximately $15.00 a month up until January 15th and I had been getting all the gasoline and other things that were necessary for the car out at the filling station at Brooks Field at government price that army officers get and after that the Inspector General restricted civilians from that and I had to make all purchases for the automobile down town which was more than twice the price at the field so that made it run around $20 or $30 a month. Around December, of 1929, I think it was he started sending me books, maybe one every week or two, up until the time of his arrest. He sent me presents for my birthday in February, 1930. They were mailed separately. They were two dresses sent me in a package by themselves and a walnut veneered cedar chest, quite a large cedar chest, some silk lingerie; and I remember there was one pair of silk lounging pajamas, and the rest silk lingerie, I do not remember the items, or how many, but there was quite a number of items in the chest. Gov-
249 ernment's Exhibit 67 shown me is a gift he gave me in February, 1930. (Government's Exhibit 67 is a blue dress.)

Mr. Wyman: We desire to offer government's Exhibit 67.

Mr. Class: We object to the reception in evidence of government's Exhibit 67, for the reason that it is immaterial, and too remote, and does not prove any issue.

The Court: It will be received.

Mr. Class: Save an exception.

Government's Exhibit 68 shown me is a gift as well as I remember that he gave me in February, 1930. (Government's Exhibit 68 is a blue dress.)

Mr. Wyman: We are now offering government's Exhibit No. 68.

Mr. Class: Defendant objects to the reception in evidence of government's Exhibit 68, for the reason it is immaterial, too remote in point of time, and does not tend to prove any issue.

The Court: It will be received.

Mr. Class: Save an exception.

Government Exhibit 68 is what the sales lady calls a dinner gown, I believe. After these things he did not give me anything else, because all this came up—. From the time I first met Major Shepard in San Antonio until this date or this matter came up I corresponded regularly with Major Shepard. During this time he gave me flowers and candy at frequent intervals. He sent just candy possibly once a month and of course for Christmas and New Year's he sent me a box of candied fruit and just candy. He always sent Mrs. Stover's Bungalow candies. On Easter, 1929, he sent me a potted plant and lilies, and on Decoration day whenever that is, 1929, I received a large box of assorted colored Gladiolas and a fern with it and those are the only flowers. I received flowers for Christmas 1928. After he left San Antonio, November, 1929, he started sending me flowers every Sunday and any special holiday like Christmas and New Year's. On my birthday he had roses sent me usually but I remember on one or two occasions they were Chrysanthemums and different things. With these flowers he sent me there would always be a small plain card in a sealed envelope which had a sentimental greeting, a personal greeting. In fact every bit I ever received from Major Shepard had a similar
250 card with it. Government's Exhibit 32 handed me in four pages are similar cards to the ones I always received with the flowers.

Q. During this time that you testified about, I believe you have already stated that Major Shepard sent you books?

A. Yes, he sent me a number of books, beginning, I think with the early part of December, 1929, and I believe he gave me two or three while he was down in San Antonio, in November, 1929, and they were always the same type—murder or mystery stories.

Mr. Class: For the sake of the record, we move to strike out the answer of the witness, with respect to the presentation of books in December, or any time after July, or June, 1929, for the reason it is immaterial, and does not tend to prove any issue.

The Court: Overruled; it will be received.

Government's Exhibit 69-1 to 69-12 inclusive shown me are books which Major Shepard gave me between November, 1929, up until the time he was arrested.

Mr. Wyman: If your honor please, I should like to call the jury's attention to the titles of these books.

The Court: Very well.

Mr. Wyman: Government's Exhibit 69-1 is "The Treasure House of Martin Hews," government's Exhibit 69-2 is "The Lion's Mouse," government's Exhibit 69-3 is "The Linden Walk Tragedy," government's Exhibt 69-4 is "Ways of Escape," government's Exhibit 69-5 is "The Recluse of Fifth Avenue," government's Exhibit 69-6 is "The Cobra Candlestick," government's Exhibit 69-7 is "Not to be Opened," government's Exhibit 69-8 is "The Dartmouth Murders," government's Exhibit 69-9 is "Murder on 'B' Deck," government's Exhibit 69-10 is "The Poisoned Chocolates Case," government's Exhibit 69-11 is "A Mysterious Disappearance," and government's Exhibit 69-12 is "The Devil and the Deep Sea."

Mr. Class: Just a moment; I do not think, may it please the court, that I made any objection to the reception of these in evidence; I do not think your honor ruled on them; I think they are offered, and I do not recall whether your honor ruled on them or not.

The Court: I think so, but you may make your objection, if you desire.

Mr. Class: I object to the reception in evidence of the exhibits just offered as government's Exhibit 69, and so forth, on the ground and for the reason they do not tend to prove or disprove any issue in this case, and too remote, and for the further reason that they are incompetent and irrelevant for any purpose whatsoever.

The Court: Very well; overruled. They will be received.

Mr. Class: Save an exception.

(Government's Exhibit 69-1 to 69-12 marked and received in evidence.)

From the time Major Shepard left San Antonio in December, 1928, up until the time after his arrest I corresponded

regularly with him and he wrote regularly to me. The number varied. After he left in December, 1928, he wrote me two or three letters and sent me a telegram en route home and then I believe he wrote once or twice a week until along in the spring until he got where he could write more often,
until he went back home, left San Antonio, November,
251 1929, and he exacted a promise I write him every day,
which I tried to do, and he would write every day and sometimes two or three times a day, from then on until this came up. I turned the letters I had over to the Department of Justice last Spring, 1930, to Mr. Davis and Mr. Lawrence at San Antonio, Texas. I burned all that I could find before the latter part, I think, of September, 1930, when I left San Antonio for my home on September 30. I burned these because two people in the house where I was staying gave me the impression that they had been reading some of the letters just for a joke and I did not care to have anyone reading a love letter of mine and I resented it and I destroyed them for that reason.

Q. Now, after Major Shepard had left San Antonio, in December of 1928, what, if anything, did he write you, and approximately when did he write you about his obtaining any divorce from his wife?

A. Well—

Mr. Class: Just a moment; do I understand this covers the period the letters were destroyed?

Mr. Wyman: Yes.

Mr. Class: The same general objection, may it please the court, to any conversations, or relation of any circumstance or transactions between this witness and the defendant after June, 1928, for the reason that it is too remote—1929—for the reason that it is too remote, and immaterial, and does not tend to prove any issue.

The Court: It may be I am mistaken. I thought this question referred to letters in 1928?

Mr. Class: No.

Mr. Wyman: She has not set an approximate date; I was going to have her do that, your honor. I was asking her first if he wrote about—

Q. All right, just state what it was, the substance he wrote about that, Miss Brandon (the divorce)?

A. As I said, when Major Shepard was in San Antonio in November, 1928, he had asked me, if he got a divorce, would

I marry him, and he brought that up later in letters, I believe it was probably January or February, 1929, and he would bring it up repeatedly, and finally told me that his wife was going to Reno to get a divorce. It seems like he wrote it in the morning, as well as I remember, and he said she was leaving "this afternoon," on one of the afternoon trains, and he was highly elated over it according to the tone of the letter, you know, and said it would not be long before he could marry me, and he would be so happy over it.

252 He wrote from time to time about getting a divorce and I think the first time was probably January, 1929, and then he finally wrote me that his wife was leaving—I think the particular letter I refer to was written on a morning of the same date that I do not recall the date of and he said his wife was leaving on one of the afternoon trains—. Relative to the same matter I received one other letter after that.

A. I think it was the next letter I received after that letter which stated that his wife had refused, suddenly changed her mind, and would not get the divorce and he intimated that, in the letter, that she wanted more financial settlement than he could or desired to give her, and he felt so depressed that life was not worth living, if he could not get the divorce he did not know just what he was going to do, that he just could not go on living without me; that is what he said in the letter.

I am acquainted with the handwriting of Major Shepard. Government's Exhibit 70 in three pages handed me is a communication I received from Major Shepard. It is dated April 8, 1930.

Mr. Class: May it please the court, we object to the reception in evidence of government's Exhibit 70, for the reason that it is immaterial, and that there is nothing therein contained which, in the slighest, has any bearing whatsoever upon the issues joined here, and that it is irrelevant to any of the issues.

The Court: Well, I suppose I will have to look at it, not knowing.

Mr. Class: We have no objection to the district attorney submitting a typewritten copy of it, first, your honor.

The Court: It will be received.

Mr. Class: Exception.

(Government's Exhibit 70 offered and received in evidence

and is a letter addressed to Grace Brandon signed by the defendant and shows delivery in special delivery envelope. Return address on envelope being Harry S. Class, Attorney at Law, Equitable Building, Denver.) Part of Government Exhibit 70 is as follows:

"Tuesday, Apl. 8/30.

"My Sweetheart: I mailed you yesterday an 8 page letter enclosing copies of 'some' of the many letters received so that you could understand my side of the case better. I am enclosing copy of letter received yesterday and have added to it extracts left out in the
253 copies you received. Have asked you to burn it dear you know why.

* * * * * * *

"An indictment is bound to be returned as the Government side *only* is heard. The Judge instructs the jury when the real trial starts, that an indictment is *not* an evidence of guilt—it is only to find a probable cause for a trial. So as you are dearest, one of the principal witnesses for the government, you will have to appear there next week—perhaps you have already been notified. Just *remember* sweetheart as you listen to the testimony, that you are only hearing *one side*. They will make it as black as they can—dont be upset or disheartened over it—for you know something of my side, and if you could know it all—there couldnt be the *least* doubt as to the outcome. I wont repeat darling what I wrote you yesterday, about what I hoped you could and would say in your testimony, only want to add that if they ask about that letter—if they have such a thing—in which divorce was talked of—to say—'Oh that didnt mean anything—that was just talk. I know he didn't mean it'—in that way—or something like that—you will know dear—in your judgment—your good common sense, and in above all in your love for me—what to and how to say it. Will be anxious when it is over, all they asked you and what you told them. As you said in your letter the other day, if you have anything to say to me you would write me personally—and that you would always tell me everything. Am so sorry that you have to go thru this but remember dear you are doing it for me—not

that I would submit you to such an ordeal if it was in my power to prevent—for your peace of mind—your smiles and happiness mean too much to me—and that will again all come back dearest—'and I'll be there with you, when our dreams come true.' With all the love in the world—always your

CHARLIE.

"You will be in my thoughts and I will be praying for you dear all the time! ! BURN."

Mr. Wyman: Q. Now, with reference, again, Miss Brandon, to what he wrote you about his wife not getting a divorce, state what else you can remember that he
254 wrote you about that, as to how he felt about it, what he felt about it?

Mr. Class: Just when was this?

Mr. Wyman: She has already testified, I believe, sometime in January or February, 1929.

A. This particular letter was not—this one, in which I mention about he said that she said she was going to leave "this afternoon" to Reno; that particular letter was not in February or January.

Mr. Wyman: Q. When was that, Miss Brandon?

A. It was, I believe, in May, 1929; anyway, it was approximately a week or ten days, as well as I remember, to the best of my remembrance and knowledge, a week or ten days before Major Shepard's wife took ill.

Q. What, if anything, did he say about what he thought about that?

A. I have already answered that question, one time, in which I said, as well as I remember, that he said that he felt so depressed and so broken-hearted over it that he did no care to go on living, because if he could not get the divorce, he could not marry me, and life was not worth while without me; in substance, that is what it was.

After he had gone back to Fort Riley from San Antonio in December of 1928 he wrote me when he got back that he found Mrs. Shepard had run innumerable bills, he said extremely enormous for an army officer on his salary and he had had to borrow money on two different notes to pay bills that she had run up on wild parties while he was gone; he said most of it had been spent for liquor. In the spring of 1929 he wrote me that he had had all his life insur-

255 ance made over to me, as,—in other words I was the beneficiary of it. That is the substance of what he wrote and he said, altogether, it amounted to $30,000.00 or a little more. In December, 1929, he sent me the original of a Will. Up until the time, as I have already stated (the spring of 1929) up until the time she took her serious illness, Major Shepard wrote me his wife was drinking herself to death or that was the substance of it, that she was drinking too much and dissipating too much in every way possible and then after he wrote me and told me that she had taken ill well at least ten days, as well as I remember it before she died, he wrote and said she would not recover, because she had dissipated and drunk so much for the last several years, that her constitution was not strong enough to stand an illness as serious as the one that she had at that time. In all these letters he wrote he always addressed her about the same "Sweetheart" or "My darling Sweetheart" or "My Darling Grace," or something similiar to that. As to the cause of his wife's illness he said, she evidently had drunk some bad bootleg whiskey. That is what he wrote me. I recall the time of the death of Mrs. Shepard about the middle of June, 1929. Major Shepard wrote me and said she passed peaceably away two hours ago, or two and a half hours ago, or something like that. The salutation on that letter which was quite a long letter was similar to what I have already testified to, you know "My darling Sweetheart," or something like that and then along in the second paragraph of the letter he told me "I have to tell you that Mrs. Shepard passed peaceably away" and said "I believe two or 2½ hours ago." In the same paragraph he said, "I suppose it was the best thing, due to the fact she had suffered so severely during her illness," and in substance he further said "My conscience is clear, I feel I have done everything I could have done for her, and could not have been helped." In that letter he said nothing about any blood transfusions but he had writ-

256 ten to me a number of times before about various blood transfusions that had been made and that he had furnished the blood for each one. In the letter with reference to her death he told me he was leaving at a certain hour, a certain time, I do not remember the time, or the date, that he was going to leave with the body for Los Angeles, where I believe her home was before she married him and that he was going to stay at the Rosslyn Hotel, as well as

I remember, in Los Angeles and if I wanted to communicate with him, to write him there, and I wired him to the best of my knowledge and remembrance, " With deepest sympathy" signed "Grace". After Major Shepard arrived in Los Angeles I received a telegram from him. Government's Exhibit 23 handed me is an exact copy of the one I received at that time. After I received that telegram the next time I heard from Major Shepard was by letter which was written the evening of the same date he wrote that telegram if I am not badly mistaken: Major Shepard wrote in substance that he was very much peeved because I had not written him in quite a little while; that he had learned General Ireland, Chief of the Medical Service of the United States Army was in Los Angeles and he intended to try to see him with reference to getting a transfer away from Fort Riley, as he could not bear to think of going back there any more and he seemed to resent it because I had not written him for quite a little while when his wife was sick and he was quite angry about it and he said "If you receive a letter, indicate as to whether—", if I wanted him to try to get transferred to Brooks Field anyway, or around San Antonio, especially Brooks Field, and if I got that, and if he did not receive such a letter immediately he would ask for foreign service, the Philippines, foreign service somewhere, and he was going to try to see General Ireland. I do not remember exactly the next time I heard from him but I remember on his way on the train from Los Angeles back to Fort Riley, that he wrote me several letters on the train that were mailed. After he got back to Fort Riley from Los Angeles after the funeral and his wife's death he drove in his automobile from Fort Riley
257 to San Antonio and arrived in San Antonio the last day of June, 1929, I think. Before he got to San Antonio he sent me a telegram from Waco, Texas, stating he was going to call me on long distance from Austin, Texas, and requested that I stay at home in order to get the call or leave the number of any place I might be in order that the call might be transferred. I do not know of my personal knowledge the exact time of day he arrived in San Antonio but he told me Sunday morning, which I think was July 1, 1929, that he arrived at 12:30 or one o'clock Sunday morning. I took breakfast with him that morning. I received a telephone call from Major Shepard from Austin, Texas. I was at the home of Miss Charlotta Schaefer in San

Antonio, Texas, when I received that call. He stated in that call that he could hardly wait to see me. Nothing particular was said, it was ordinary conversation, just that he could hardly wait to see me and that he realized he was going to get into San Antonio so late that he could not call me from the hotel after he got to the hotel and that was the reason he was calling me from Austin. It was in this telephone conversation that he made arrangements for me for breakfast with him the next morning. We had breakfast at the Coffee Shop of the Plaza Hotel, San Antonio, Texas. It was not at the breakfast that he asked me to marry him secretly, it was in the evening sometime, he was there three or four days and it was some time while he was there in the evening when we were driving around town or something like that, I do not remember the exact time, the hour of the day, or the exact date. After he left San Antonio it was the 29th or 30th of October, 1929, to the best of my knowledge before he returned again, when he stayed about ten days or two weeks as I remember it.

Q. Miss Brandon, when was the first time you received, and did receive, any wedding plans for a wedding tour, after your marriage?

A. You mean an outline of a trip?

Q. Yes.

A. I think it was in July, 1929.

Mr. Class: May it please the court, defendant objects to any further conversation along this line, for the reason that it is too remote, immaterial, and does not tend to prove any issue, it occurring after June, 1929.

The Court: You may answer.

Mr. Class: Note an exception.

258 The first time I received any wedding plans for a wedding tour I think I got in July, 1929, the first plan or outline for a wedding trip. Up to that time it was discussed and at that time we finally agreed and settled on August, 1930, for the wedding. It was after the conversation that I had with Major Shepard in July when he was there about our getting married. Government's Exhibit 71 in two pages, 72 in two pages, 73 in three pages, and 74 handed me are four sets of outlines of wedding plans which I received at different times from Major Shepard, I do not remember just which one at this time I received first.

Mr. Class: Defendant objects to the witness testifying to the contents of the exhibits.

The Court: That might be sustained, but the question does not call for that, so I cannot stop it, of course. He asked if those exhibits refer to those plans.

Mr. Class: We submit that the exhibit is the best evidence.

The Court: I suppose the exhibit technically would be the best evidence. You want to put those in, anyhow?

Mr. Wyman: I want to put those in, your honor, as soon as I find out if those refer to the wedding plans.

The Court: You may answer.

Mr. Class: Exception.

One of these outlines I received in July, 1929, and the others at different times. It was between the time Major Shepard left San Antonio in July, 1929, until before I saw him again in October, 1929, that I received all of these wedding plans.

Mr. Wyman: I desire to offer, at this time, government's Exhibit 71, in two pages.

Mr. Class: Defendant objects to the reception in evidence of government's Exhibit No. 71, for the reason that it is immaterial, it relates, first, to matters in contemplation after the month of June, 1929, and particularly refers to contemplated acts in the future, and for the general reason that it does not tend to prove anything. It is too remote in point of time.

The Court: What is the date of it?

Mr. Class: It is not dated.

The Court: Isn't it dated? Is is one of those that occurred between the meeting in July and October?

Mr. Wyman: Yes, that is correct.

The Court: It will be received.

Mr. Class: We save an exception.

Mr. Wyman: I ask permission to read it, your honor.

The Court: Very well.

(Government's Exhibit 71 was marked, offered and received in evidence.)

In brackets at the top of Exhibit 71 which is written on stationery of the Fitzsimons General Hospital, United States Army, Denver, is (Have marked the pamphlets—you
259 can pick out the Hotel you want to stay at, dear).

(Exhibit 71 consists of a letter enclosing an itinerary made out by Major Shepard containing the names of towns

to be visited, cost of railroad tickets, meals, hotels, and back to San Antonio, and the cost of gas and oil for car driving from San Antonio to Denver. This itinerary takes in the East, that is, New York, Albany, Toronto, returning by boat to New Orleans. It also has dates, and costs are itemized. Total cost $889.25. Exhibit 71 also contains letter of explanation including additional trips around Pike's Peak, Garden of the Gods, and Denver, which would bring additional total cost to $1405.00. Also the statement "then have from 18 to 30th, 12 days, to pick out our apartment 'our own little nest' and get settled before returning to work.")

Mr. Wyman: I now desire to offer government's Exhibit 72, in three pages, in evidence.

Mr. Kagey: I thought that had been offered.

Mr. Class: Same objection, may it please the court. The defendant objects to the reception in evidence of Exhibit 72, for the reason that it is too remote, subsequent to the month of June, 1929, and does not tend to prove or disprove any issue in this case, and for the further particular reason that it shows on its face that it is something going to happen possibly in the future.

The Court: Overruled; it will be received.

Mr. Class: Save an exception.

Mr. Wyman: I will read this, if your honor please.

(Government's Exhibit 72, marked, offered and received in evidence is a letter containing an itinerary for a wedding trip written on stationery of Fitzsimons General Hospital itemized by date, and amounts to be spent each day for a trip going to the West Coast, Los Angeles, San Diego, San Francisco, and back to Denver by Kansas City. This trip also includes a trip to Hawaii. The total itemized proposed expense being $1708.88.)

Mr. Wyman: Then, we will now offer government's Exhibit 73 in three pages, and government's Exhibit 74, in two pages.

Mr. Class: Is this another bridal trip?

The Court: How many trips are there?

Mr. Wyman: Four plans, your honor.

The Court: Four plans?

Mr. Wyman: Yes, I have read two of them.

Mr. Class: With regard to Exhibit 73, we make the objection it is immaterial, and the matters referred to there are mere supposition and written long after the month of June,

1929, and does not tend to prove any issue in this case, and appears on its face to be nothing except plans for the future.

The Court: Well, it is like the other plan.

The Court: Yes, overruled.

260 Mr. Class: To which ruling of the court, the defendant saves an exception. With respect to government's Exhibit 74, there does not appear to be any date on this. We have not had time to look at it; it probably will take a little time to look it over. If your honor will bear with me, while counsel is reading this, in order to save time, we will just look this one over?

The Court: Yes, all right.

(Government's Exhibits 73 and 74 marked and received in evidence, made a part hereof, and read by Mr. Wyman.)

(Government's Exhibit 73 is another proposed wedding itinerary itemized by dates and towns to be visited by auto, train and boat which includes St. Louis, Chicago, Detroit, Niagara Falls, etc.) (Government's Exhibit 74 marked, offered and received in evidence and is a letter from the defendant Shepard to Grace Brandon discussing wedding arrangements as to whether she would want a quiet wedding or a large one with matron of honor and bridesmaids. The three days' notice before a license is issued, then a detailed account of what shall be done during the time he is there e. g. "Friday 1st, arrive at Katy depot 6:15, my sweetheart will meet me in her car, drive to Hotel, register and then to dinner together, a short drive and home and hotel. Picking out presents for bridesmaid and best man, and letter ending "Does this meet with your approval darling? With all love, your sweetheart 'Charlie'.")

Mr. Class: Object to government's Exhibit 74, it is immaterial, the matters referred to are merely supposition, and in contemplation, and the whole exhibit is evidently written after the month of June, 1929, and does not tend to prove anything, and is immaterial and irrelevant to any issue.

The Court: One of the plans?

Mr. Wyman: Yes, it is.

The Court: It will be received, objection overruled, and exception allowed.

Mr. Class: May it please the court, with respect to government's exhibit offered in evidence, No. 75, defendant makes the objection that it is immaterial, for the particular reason that it is written long after the month of June, 1929.

The Court: What is the date?

Mr. Class: Long after the month of June, 1929, to-wit, it is postmarked March 14, 1930, this year, and does not tend to prove or disprove any issue in this case, and is irrelevant for any purpose.

The Court: It will be received.

Mr. Class: And too remote.

The Court: Yes; overruled. It will be received.

Mr. Class: Save an exception.

Government's Exhibit 75 in 6 pages handed me is a communication I received from Major Charles A. Shepard.

261 (Government's Exhibit 75 marked, offered and received in evidence.) Government Exhibit 75 was written March 14, 1930, in ink and in the handwriting same as signature. Government Exhibit 75 was read to the jury and is as follows:

"Thursday afternoon, 3 P. M.

"My Sweetheart: While I am waiting in the ward dear am starting my letter. After thinking over things today dear have decided to go on and write every day, as I have always done—even though you are not writing—or until you tell me or show me that you don't want me to! I was up at 5 this morning, wrote on last night's letter—had breakfast at 7:15, read morning paper & then up to post office with your letter—to

262 work & was busy till 11—when I went to E6, to check linen, as there was a shortage in pillow cases. But it was a mistake in counting them, as they were all right. Then to foot office & to club—had milk toast & laid down till one—when I made rounds on E6 & to D2, make an examination, then to see about a replacement for my ward master, as he is leaving Saturday, and will have to break a new man in. Back here & am now writing. You are probably home dearest by this time, or down town shopping. I have tried to visualize all you have been doing this past week but of course can only guess. I feel so badly am going to bed as soon as duty hours are over—4 o'clock. Have a splitting headache. It was colder this morning but has warmed up during the day.

"My dear sweetheart, can't I make you love me again—you have been so dear and sweet to me. I don't deserve you I know dear—have always said I was

unworthy of you—but I have loved you deeply. It will be two years in November dear—do you still remember when & where we pledged our love first—do you remember the first sweet kiss you gave me—I was so happy that night to feel those dear arms around my neck—and how often they have been there since—each time more precious than the previous time. I know and feel somehow today dear, that they will be around me again, with the same love that caused you to put them there before, won't they? Don't you feel dear that I have suffered enough for my nasty letter? I am willing to do what you want me to, in any way dear, to atone, so that we can be the same loving sweethearts we have always been—don't you want to be too dear? You have always said you were so happy in my love—to be in my arms—to be thinking of you always—and you know how happy you made me darling! Dear Grace, this is a terrible thing to happen to me—I have suffered mentally, as only a guilty conscience could. Can't you let me show you by my devotion, by my love—that I am sorry—*so sorry* dear!! Every look—every smile and every action comes visibly before me, and I long dear even to be able to kiss the hem of your dress, for I actually worship you sweetheart!

"I hope that the dress & sport suit sent you yesterday fit you dear and that you are pleased with them. If not you can send them back, telling what size or just where they don't fit, and they will send the proper size. I will continue to pay on the other things dear—dresses & coat—as they were picked out for *my* darling, for her trousseau. I looked at a tweed suit also, as you will need one of those but don't know whether you want a double breasted one or not, also a pretty print chiffon which would look sweet on my precious sweetheart!!!

"Oh Grace, we have so much happiness ahead of us—so many places to see together, both in this and foreign service, that we mustn't let this thing separate us dear—don't you realize that sweetheart? For I *love* you, I *love* you—you are the ideal of my dreams. Oh yes dear, and of my life too! I want you—I need you dearest. I want your arms around me 'morning, noon & night.' I don't want anyone to steal you from me

dear. I want to be able, when in sickness & fear, to take you in my arms, and share it with you—by my love and tenderness—to take all the aches away, make my darling well, and happy. I know I can make you happier than anyone else in the world can dear—*You, yourself*, have said so—so please let me darling, as I was trying to do—and you will never have occasion to complain of me—or be hurt by me any more! Make me so happy again darling, by writing that I am forgiven and that we are the same sweethearts again. It will make me so happy dear—but if you can't—if you have lost that great love you had for me—why I will have to bear it—but be merciful—first, to forgive me & take me back—if not then be merciful and tell me dear. It will make a difference in my plans—not for myself, because in such an unthinkable event, there will never be any plans that will affect me. I will simply have to drift like a ship without a rudder—(your loving guiding hands won't be there), but I will have to cancel the leave that Col. Halloran has given me, one month, in order to be married, so the officers are being notified today, which dates they can each have, during the summer months—two weeks each. So if
263 I am not to use mine will turn it back, as I won't want any leave at all—hard work will be what I need, and the harder the better—to keep my mind going. Then again if I am to take the leave, there are lots of small things to be thought of & got ready—the checking of all ward property—the looking around for clothes for myself—for a steamer wardrobe for my darling, for your clothes, & so on. Sweetheart, I am not blaming you for not writing or not answering my wire, though that was hard, but please—please let me hear from you now—again I ask *be merciful* and *forgive* me, and let us forget together this past ten days. I know sweetheart you are bighearted and noble spirited enough to do it, if you will let 'love' have its way—*Won't you dear?*

"Sweetheart, when I opened the door of my room, the first thing that I saw was your dear face in your picture smiling at me, as much as to say—'I do love you, Charlie.' I picked it up, kissed those lips and cried

like a child. Oh sweetheart of mine, I do love you—please, please forgive.

"On the table in front of me is a booklet—'One hundred golden hours at sea' and a plan of the three boats from New Orleans to New York, which I had ready to send on to you dear, so will mail them tomorrow when I get a large envelope.

"Sweetheart dear, isn't there anything I can say that will touch your heart—that will revive the spark of love again. You did love me darling. I read and reread your letters last night, they were so sweet, so full of endearing terms—that I can't believe dear that I am to lose you.

"6 o'clock. My Precious Sweetheart:

"While I was writing the above the phone rang & the postmaster said there was a special delivery letter for me & they would bring it down. I had been for the mail at 4, but they hadn't said anything about it. I walked the floor dear until the clerk came. Just before I opened the door the radio was playing—'Behind the clouds is the sun still shining—In the distance there is a silver lining—have a little faith in me'—(is now playing 'when its autumn time in the Rockies I am coming back to you'). I prayed that the letter might be from you and when I opened the door my heart dear gave a jump, for there was the long looked for blue envelope. Oh how happy dear I was my hand shook so I could hardly open it—and when I saw the opening words—'My Darling Sweetheart' I pressed my lips to them, for those dear precious hands had written them. I read it thru and it made me so happy. Had to go to supper. At the foot of the stairs (radio now playing 'Happy days are here again'—all seem to be for this happy occasion), I met the Chaplain. I held up the letter & said—'God's in His Heaven, all's right with the world.' I had told him darling how worried I was—he answered—'You have heard'—I said yes—he said 'I'm glad, that is fine.' I went on into supper feeling a different man sweetheart—couldn't eat much as I was so excited, but will settle down now.

"Now to answer the letter dear. Yes, sweetheart of mine I will forgive you anything! Terribly sorry you had to be so busy dear—suppose it couldn't be helped

but you shouldn't have to do it. Those hours—7 to 6:30 or 7 is more than anyone can stand dear. However dearest, you won't have very much longer to work that way. You poor dear, you must have been so tired when you got home—hope that you rested Sunday dear when you had a chance. Yes, I think the delay in getting your letters is due to failure to collect at the local box. Glad the Black Circle arrived safely, and hope you will enjoy it dear. Glad you liked Fathers picture. I forgot to tell you about the slipping when I sent it on. Note what you say about the carburetor dear—it doesn't pay to let them fool with it, but of course dear, you couldn't help it. No precious, your man loves you and you only! You ask about the unruly patient—will be straightened up after a reprimand. Yes dear, the radio I think was a good bargain —is a nice piece of furniture as well & know we will
264 spend many happy hours together next winter listening to it together, with you in my arms! Yes, have told you what Col. Halloran said about Cooper, when he wanted me to take two weeks. No dear, he didn't mean for us to change the date—if I wrote that—he said two weeks now and then take more later, I was wrong—he wanted me to take two weeks in Aug. & rest later—but that is all settled now & Col. Halloran has given me a month. Now about the new plans dear I will go into that later on in this letter. No dear, I didn't take cold that Sunday night. Yes, we will take in the scenes on Lookout and so many other places too darling. Dr. Barton stood his operation fine & is now sitting up.

"Yes sweetheart, the Chaplain is not only jolly, but a good friend—a good sport and thorough gentleman. Yes, I wished for you at Major Crawford's dinner too dear—in fact am *always wishing* for you *all* the time. I don't believe there is, or has been, anyone so much in love, as I am sweetheart! Note that you say you didn't intend to hurt me in your letter dear—but did, at the time, think it cruel dear—but that is all over now, and we will forget all about it now that the sun is shining again for me dear.

"Now about our plans dear, let us leave everything as they stand until I come. That is I mean I am expecting that everything will be bright & happy for us

by July 1st so there will be no more worry over financial affairs. We will have enough for our trip as we have planned it—provided we have enough time to do it—and your clothes I am already taking care of sweetheart. Now first of all we have a month. This is going to hurry us dear. We can make it in this way: Take the boat at New Orleans—that will be a week gone dear before we start on account of having to be there three days prior to securing license, then we could only stay one day in New York & one day in Niagara Falls & one in Toronto, as we will have to return to S. A. to ship your trunks & drive car here. Now what do you think—this makes you hurry around so, but it will be what you want to do, or if you think this will hurry us too much we can take train to Niagara Falls, take our time there & at Toronto & then back to S. A. or we could make this last trip all the way by auto & not have to return to S. A. but this I am afraid would tire you darling. That is why I say to leave our plans for trip indefinite for the present. I will be there 4 days ahead sweetheart, and we can complete our plans after we have all the data—what do you think—I'll do as you wish. Thought of course at the time I started making plans that I would have two months. I have explained since about this.

"Now about you not loving because you wanted to postpone the wedding—I am sorry I wronged you about that, but I have always heard that to postpone it dear, was bad luck, and tended to end it—that is why I wrote as I did—as I said I am sorry, but we are not going to postpone it dear, are we? Yes, I played golf one day and broke a club—it had dried out and was brittle. Yes dear I know I dressed wrong—I know it hurts me and will try not to any more. So sweet of you to wonder what you would do way down there if I was ill. My darling, my stomach has been upset so that I had to start back on my medicine—lost my appetite too—but that will clear, sweetheart now. No, Major Raycroft didn't take any leave—started in to work, now waiting for orders. Glad that you did take your rest darling, as I asked you in another part of this letter. You darling sweetheart, how I would have longed to have held you in my arms when you were

so tired Sunday, as you wished it too, and know too that you would have felt better. Glad that my message of love Sunday pleased you darling. Wish I could have taken the place of the flowers! My cough is all over now dear. Note how you had the bumper broken dear—yes, everyone will try to bluff you if they can. Your mileage is low dear but it will perhaps increase as the engine wears, it is more at that than I got from the Chrysler. I mailed the expense money dear for you & will send the other for Feb. as soon as I can. Note what the fortune teller told you—no dear, they guess a lot—but the last part of what she told you is true—'that you would be like a ray of sunshine in my life.' No words can be truer dearest. Yes, I wished for you all evening at Mrs. Yrades' party, it was here
265 at the club. There is another one here tonight but am not invited. Next Monday, St. Patrick's Day, Major & Mrs. Price are giving a dinner & dance for 70 here at the club. Next day Major & Mrs. Squires dinner here, prior to regular bridge night, on Friday 21st Major & Mrs. OBrian, Major & Mrs. McGow dance—'tacky party' here at the club, 25th—Mr. & Mrs. Newcome, live in Denver, former army people—was on duty here—dinner & bridge 7 PM & way over in May 6th Mrs. Shaplain Wrights postponed dinner prior to bridge club, all to which I have been asked. It won't be very long before my sweetheart wife will be here to attend all with me. Yes dear darling, I am glad you are going to save the 'nighties' for your trousseau—won't we be so happy dear? Yes indeed I am glad you are keeping them, and now that all the misunderstanding on my part has cleared away. Hope you will save your 'Glen Bougie' 'sport suit for your trousseau too dear—don't mean for you not to wear it if you want to—but I wanted to see you in the things I am sending you dear. Glad you liked the hose dear. So you think you could stand 10 letters every hour. Do you darling—how wonderful & sweet you are to me and I am so unworthy of you. Glad you think I will look nice in a gray suit dear and black top coat dear. I always want to look sweet to my darling. Note that many men are being married in light suits, or would you rather have me be married in dark suit? Glad you got those

letters in one day. Sent you a clipping about the findings in Mrs. Raycroft's case this morning. She was taking Hyosine (?) to put her to sleep & took too much. Will send the cobra candlestick in a few days dear. Glad, so glad—my own darling—to have you say that you love me so much. I want you always to, dear heart.

"Well dear I won't have to take a sleeping powder tonight—your letter has made me so happy. I can close my eyes to the rest of the world and dream sweet dreams of you—and what a different man will be starting to work tomorrow morning—no matter what the weather—my spirits will be up in the skies—but my heart will be with my darling sweetheart in S. A., where I wish I was right now. How I would love & carress you dear—will be so happy to get another letter tomorrow.

Should I reveal exactly how I feel—
I would have to confess—'I love you.'
Always your sweetheart.

"The music over the radio seems so much sweeter tonight—I wonder why—do you know? I do—(because I'm happy). Col. Halloran's sister just phoned for me to come to dinner at Cols. house prior to tacky party 21st.

"Friday morning—6:45.

"Good morning my Darling: I have said it already to your picture and kissed those dear lips—not with tears this time, wishing the real lips were here for me to love!!

"No, dear, I want you to feel that I am doing everything I can to make our plans for a trip successful. You know the old saying—'there is nothing sure in this life but death & taxes.' Anything might happen—illness, accident—or in the army *changes* too numerous to mention. Once I had 3 changes of station in 4 weeks. Col. Halloran has given or said I could depend upon a month—something may come up to change that. I'm never sure of orders until I have them in my hand. Now sweetheart, I don't want to dampen your hopes,—or have our plans crash as you say, any more than you do dear. This is the *greatest* and *happiest* event of my whole life, and I hope it will be for you. I am

just mentioning these possibilities darling for such things have occurred before—don't want them to occur in our case, so please don't feel or write as you did, that I wasn't frank, that I was trying to get out of it all. My dear, you know differently now. So as I said in last night's letter—we will go on with our
266 plans—they were never brighter than they are right now—dream in them & they will come true—as in the words of the song sweetheart—

'In the distance there is a silver lining
I see it shining;
Have a little faith in me.
I'll come thru dear—with the help of you dear—
Have a little faith in me!'

"We have each other—and everything will come out all right darling—but if something sudden & unlooked for appears—don't be downcast or too disappointed—remember that—'behind the clouds is the sun still shining'—and remember your Charlie *loves* you *so so dearly.*

Always your sweetheart,
CHARLIE."

Fitzsimons
Mar 14
9 A M
Colo 1930

Special Delivery
Miss Grace L. Brandon
2604 So. Presa St.
San Antonio, Texas."

Government's Exhibit 76 is a communication I received from Major Shepard. (Government's Exhibit 76 marked, offered and received in evidence.)

Mr. Wyman: We now offer government's Exhibit 76 in evidence.

Mr. Class: Defendant respectfully objects to the reception in evidence of government's Exhibit 76, for the reason it is immaterial, and bears on its face the date of October 16, 1929, not tending to prove or disprove any issue in the case, and is wholly irrelevant and too remote in point of time.

The Court: It will be received.

Mr. Class: Save an exception.

(Government's Exhibit 76 marked and received in evidence, made a part hereof, and read by Mr. Wyman.)

Government's Exhibit 76 written in ink and same handwriting as signature is as follows:

"Denver, Colo., Oct. 16/29.

"My Dear Sweetheart: Your long looked for letter came just as I was going to lunch. So—so glad dear to hear from you. I didn't write yesterday as I haven't heard from you for so long and then I had some bad news too that upset me so I didn't eat any lunch and slept very little last night—feel better today. Denisons wanted me to go to the Officers' Bridge Club last night but I was too nervous. Will tell you about it tonight and will answer your letter in full then. Have to take the next bus to town to get my berth
267 and ticket for Friday and get back here at 7 P. M. in time to eat. Don't forget dear you haven't told me yet the time to meet you. With all love.

Always your Charlie.

"Just wanted to take this note in with me and post it in town—just to let you know *I love you.*"

(Government's Exhibit 77 identified being a communication received by the witness, Miss Grace Brandon, from the defendant, C. A. Shepard, and was marked, offered and received in evidence.)

Government Exhibit 77 was written after Major Shepard left San Antonio in November, 1929. While in San Antonio in November, 1929, I had a conversation with Major Shepard in which he stated he had gone through too much to lose me now. I think it was while we were on a drive to Eagle Pass. Two or three nights while he was there in November, 1929, I went out with another Army officer who was and is now stationed at San Antonio and of course Major Shepard resented it very much and got quite angry about it and that is what he had reference to when he said he had gone through too much to lose me now.

Mr. Wyman: We now offer government's Exhibit 77.

Mr. Class: Defendant objects to the reception in evidence of government's Exhibit 77, for the reason it is immaterial, written after the month of June, 1929.

The Court: What is the date?

Mr. Class: It is November, 1929. It is too remote, and

does not tend to prove any issue in the case, and is wholly irrelevant to any issue whatsoever.

The Court: It may be received.

Mr. Class: Save an exception.

Government's Exhibit 77 written in ink and same handwriting as signature, read in evidence, and is as follows:

"Fort Riley, Tuesday 5 P. M.

"My Dear Grace: Am now sitting in my room. Capt. Hyndman met me at the train and brought me up here. I unpacked some things I took with me to S. A. and won't need in Denver and repacked a suit case to go over to Hyndmans. He is coming back for me in a little while. I wrote in the letter that I posted at the station at Manhattan, that this was your afternoon off, thinking it was Wednesday and even
268 wrote Wed. at the top. It has been a lonesome day dear and will be glad to get to work if they will let me, for hard work and being busy will keep me from some thoughts I want to forget if I can. Wonder where you are now and who is with you, in my place?

"Am starting this and will post it in Junction City when I go over in the morning. Am tired and sleepy after my trip so bed will see me early as I have a busy day ahead of me tomorrow.

"10 P. M. Thought I was going to bed early but after dinner Capt. and Mrs. Hyndman, Capt. and Mrs. Dye and myself drove to Junction City to the movie—"The Cocoanuts." It was a talkie comedy. We drove home in a driving snow storm and it is much colder. My heavy coat felt good. Hyndmans had a duck dinner which was very nice but Skow has company for me tomorrow night for dinner and Capt. Dye on Thursday, Capt. Holycross for Friday night. Everyone seemed glad to see me. All through dinner Dear I was wondering where you were and if you had any thoughts for me. Am writing in my room at Hyndmans so I can post this when I go to Junction City in the morning. Wonder if you have been thinking of our future today. It is always in my mind dear and

I hope nothing will come to change our plans or our love for each other.

'The skies will be always blue
When my dreams come true—
And I'll be there with you
When my dreams come true!'

"Goodnight dear wherever you are right now—think once in a while of me for you know I love you.

Always your Charlie."

Government's Exhibit 77 was written about the middle of November, 1929.

(Government's Exhibit 78 is identified as a communication from the defendant C. A. Shepard to witness Grace Brandon.) It was received about the middle of November, 1929, and written enroute, from San Antonio to Fort Riley.

Mr. Wyman: Now, we desire to offer in evidence, government's Exhibit No. 78.

Mr. Class: Object to the rectpion in evidence of government's Exhibit 78, for the reason that it is immaterial. It bears on its face the date, November 11, 1929, it does not tend to prove or disprove any issue in the case, and it is too remote for any purpose.

The Court: It may be received.

Mr. Class: Save an exception.

Mr. Wyman: I desire to read it, your honor.

Government's Exhibit 78 written in ink and same handwriting as signature is as follows:

"November 11, 1929.

Texas Special
EnRoute Between
St. Louis and Texas

12:30 noon

"My Sweetheart: Didn't wait until we arrived at
269 Waco to post your letter, but mailed it at Austin. Have just left there. When the train pulled out of S. A. and my ticket taken up, went back to the observation car—smoked and read and wrote to a wonderful girl. Am having a sandwich and glass of milk for lunch and will eat dinner in the diner tonight. Weather has turned very warm. Everyone in shirt sleeves at station in Austin and it is hot in the cars. Still cloudy but they seem to be heading away.

"Name of the car I am in dear is 'Fairweather'—

good omen for me—fair weather ahead for both of us, isn't there sweetheart. Isn't such love wonderful? It is to me Grace, for you have made me so happy, and I trust and pray that you will never allow anyone—or anything—to change you, or make you act one bit different to me. I am sensitive to every change in you dear—even in your letters, but know now there will be no more misunderstandings or little quarrels—'True love never runs smooth' and we like everybody else sweetheart will have our little petty troubles and trials, but with mutual *love, trust* and *understanding* 'the trials of today will tomorrow fade away' and there will be no two happier people in the world than we are! Your happiness dear, is worth more than life itself, and I pray that I may be spared to show you how truly I love you, the sweetheart of all my dreams. I wonder where you are right now—just one o'clock, taking a nap or eating lunch? Hope you got home without any trouble with the car dear—the streets were wet this morning, and you are too precious to me to have even a hair of your head injured. I don't love you, do I!!! Will post this at Waco sweetheart—each turn of the wheels is bearing me farther away from you, but I have left my heart behind dear, and you will always be in my thoughts because 'you're the first one I think of in the morning and the last one I think of at night and I'll meet you in my dreams dear'—my *life*, my *all*.

Always your Charlie."

(Government's Exhibit 79 identified as a communication from the defendant C. A. Shepard to witness Grace Brandon.)

Mr. Wyman: Government's Exhibit 79, in three pages, now offered in evidence.

Mr. Class: We object to the reception in evidence of government's Exhibit 79.

The Court: What is the date?

Mr. Class: It is dated January 18, 1930;—for the reason that it is too remote, immaterial, and does not tend to prove or disprove any issue in this case.

The Court: It may be received.

Mr. Class: Exception.

Mr. Wyman: I desire to read the exhibit, your honor.

Government's Exhibit 79 is dated Saturday evening, January 18-30 and begins "My adorable Sweetheart". Part of

Exhibit 79 written in ink and same handwriting as signature is as follows:

270 "I love you so much darling and am lonesome for you tonight. If I feel all right tomorrow will go down on the bus and post this in town, being Sunday, so you won't be disappointed. 'Glorious, lovable, *wonderful* you, I want you to know that I care, I want you to know that life's happiest hours, are always the ones that you share!!

'Someone means so much to me
In all that I say and do
Someone brings great joy to me
With a love that's fine and true.'

"Do you know who that 'someone' is sweetheart? Someone whom I'm proud to say is *you*, just *you*—my dear!! *I love* you—*believe* me. *I love you*!!!

Always your Charlie."

Government Exhibit 79 also refers to two books "Ways to Escape" and "Cobra Candlestick", also some reference to clothes and the suitability of the style to be chosen. (Government Exhibit 80 identified as a communication received by the witness Grace Brandon from the defendant C. A. Shepard.)

Mr. Wyman: The government offers Exhibit 80.

Mr. Class: The defendant objects to the reception in evidence of government's Exhibit 80, for the reason that it is immaterial, and bears the date, January 19, long after June, 1929, not tending to prove any issue in this case, and is irrelevant for any purpose.

The Court: Overruled, it will be received.

Mr. Class: Save an exception.

Mr. Wyman: I desire to read it, your honor.

(Government's Exhibit 80 is dated Sunday, January 19-30 and beginning "My dear Sweetheart", is written in ink and same handwriting as signature, and was read to the jury. Part of government's Exhibit 80 is as follows:

"I also sent the Hauser Floral Co. the cards for Sunday up to May 4th. I intended sending them the other day but didnt have them all written up."

Also reference to gifts of jewel boxes and to the fact that a quiet wedding might be wanted because of the difference in ages.)

(Government's Exhibit 82 identified as being a communication in three pages received by the witness Grace Brandon from the defendant, C. A. Shepard, about January, 1930.)

Mr. Wyman: We desire to offer in evidence government's Exhibit 82.

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Mr. Class: The defendant objects to the reception in evidence of government's Exhibit 82, for the reason that it is immaterial. As I understood, the witness said January of 1930. It is too remote, and appears to refer to matters long after the month of June, 1929, and is incompetent and irrelevant for any purpose, and does not tend to prove or disprove any issue whatsoever.

The Court: Overruled. It will be received.

Mr. Class: Save an exception.

Government's Exhibit 82 written in ink and same handwriting as signature was read to the jury and is as follows:

"Monday afternoon.

"My dear Grace: Was deeply grieved when I went to the post office twice today and there was no letter for me. The last letter you wrote was Tuesday. Of course the silence I suppose, can mean only one thing —that you are angry, that you wont write any more— that you have ceased to care. Well then, dear, how do you think I felt when I got such a letter from you —it sure tore my heart. Then the next day I received such a lovely letter. Such a change in 24 hours. Since then a silence—and what a lot of meaning one can take from that one word. *Well dear Grace, my love for you has been too deep, too overwhelming, to be killed, no matter what you do, so I am not going to reproach you.* You know your own heart—you know whether you loved me enough to take me as I am. I think my actions in all I have done have shown you something of my love—as you yourself have said many times, as well as others, your friends, in what you wrote to me, also your brother. However, if there is someone else— if my dream of happiness is over—I will have to bear it in some way. It will kill me, darling, dont you know it? Doesnt your heart tell you so—cant you realize dear, what you have been to me—haven't I been something to you? Something that you cant throw away—something that is enthroned in your heart, darling—as you are in mine. I was so proud to show your

picture again to the Wallins last night, and to talk over our plans, they were so interested. But now it looks as if there were to be no plans, no need to worry over leave or anything. Everything is just a blank. Will hold this until tomorrow to see if there will be a letter, and if none comes then will send this on as my last letter, because I am not going to worry or bother you, in that case, with letters you wont want to receive. They will only keep my wounds wide open. Would that I could get away from it all tonight as long as you dont love me—dont care any more. Is it to be that Grace? If so, pray that God will help me. Your *happiness* was, and is all that I am living for—you have said you knew you were going to be so happy—that there wasnt *anyone* in the world could make you happier. I thought so too, sweetheart—was it all a dream, dear? Pray God it was not, and that I will get a letter tomorrow. Was going to wire you tonight, but decided to wait until tomorrow. *My love for you dear, has made a better man of me— if I do have to lose you— that will always be a comforting thought—what an*
272 *effect you have had on my life.* For *'Life is richer, sweeter for, for such a sweetheart as you are.'*

"9:30 p. m. Have just returned from making calls on Major and Mrs. Craig and Major and Mrs. Campbell. We started to wear the black band today. All official affairs are cut out but the bridge club—private parties and dances are not. Grace, I'm sorry I got so angry the other day, but your letter hurt me so, to think you had such little faith in me, to write that I had told you a falsehood—that I was trying to get out of it all! My dear—for you to ever *have* such a thought that *anything* or *anyone* could change me toward you? Wasnt that unkind dear? In my letter I told you if there was someone else—or you wanted to postpone the wedding—for I know what such things mean—that I would want you to send me the ring and turn in the car on account of the mortgages on it. *Sweetheart, I dont mean that.* In the first place when I wrote that, intended to sell the ring and apply the money on the notes—as *no one* else in the world can wear my *token of love to you.* As for the car—would have either sold it or would have taken it for myself—as

having *something* belonging to you. But I cant do either dear—as I wrote you in my letter. I gave everything to you in *love* and they are yours to keep. I will gladly keep on paying on the car and the note at the bank against the car, knowing and feeling that at one time you *did* love me, and in memory of that love, and *my* great love for you, it will be a source of happiness and comfort to me, that I am still doing something for you, even though you wont belong to me. I will never bother you dear, but will live on memories alone, for my love can never die. I sacrificed a lot to give you the car, have gladly and willingly suffered discomforts, that you shouldn't, so please forget what I wrote about the car and ring. You can sell them if you want to, and dont want to remember me, but they are yours. I will send you notice, if you want me to, when the car is paid for; the ring was paid for when I gave it to you and everything else has been, except the car, dear.

"It is now 12.30 dear. I was so lonesome and restless that I put on my coat, walked out the gate—walked down to Aurora, two miles, and back another way. It was a beautiful moonlight night, and, as I walked along, all my thoughts were with you—wondering what was going on and if you really had forgotten me. I will close dear, and go to bed, and try to rest. Major Crawford has to go to court again tomorrow and I will have all the pneumo treatments to give alone with the assistance of an intern. Do wish I could see you tonight and whisper something to you. Your picture dear, is smiling at me as I write and I just cant believe that you have given me up. With all the love in the world to my sweetheart,

Always your Charlie.

"'Not for just a day, not for just a year, but *always*.'

"I have had a blue chiffon dress, size 38, held for me is that the right size, dear? Am enclosing check for $22.50 for expenses of the car for Jan. Sorry I can't send for Feb. too, right now, but had the income-tax to pay—will send it later, dear!

"Tuesday, 4.30. My sweetheart: Will call you that for this time. Perhaps can never do so again. I had this letter sealed and ready to mail but waited to see,

hoping beyond hope—that there would be a message of love for me, but none came. I came here after the clinic, sent you a wire and the chaplain is going to take this to the postoffice in town for me. *Dear, dear Grace,* is it all over? Has your love for me—whom you said you loved dearer than life itself—whom you said nothing could separate you from—and what you have repeated many times, that you would *not judge* me or I you, until we had a chance to explain. Seven full days have gone by and not a word—what can it all mean—are you so offended at what I wrote about the car and ring—did you ever stop to think dear, that your letter might have hurt me!—I have tried to explain in the other part of the letter dear—so perhaps you will have a better understanding of how I felt. Well Grace, it
273 looks to me now, by your silence, that you want everything to be over with—I can take no other meaning from it. So be it darling—it can be all over with you but it can *never* be over for me. Whether there is someone else now who shares your heart—your love—and your life—I don't know. I just want to say that you can have the satisfaction of knowing that you *were,* and *are* loved with a love that comes only to a man, once in a lifetime—for the one woman he has put above everyone else in the world. 'My sweetheart Grace!' My love for you cant die, but I will love you in secret. In my unhappy hours—especially during the silence of the night, I will have your loving letters to look at and to think of all the plans and all the love that was given you in everything I have done for you—but which love is so lightly thought of now. When the first rife came between us you had so little faith in me! Everything would have been alright dear, the money for your clothes—the money for our trip—all would have been forthcoming, but you jumped at conclusions, because at the time I wrote I said I was worried over finances, and would have to borrow for our trip. Well, it is all past now, dear—there are no plans, no trip—no happiness for me, so will have to regulate my life accordingly. No one can ever take your place with me—you are part of my heart and *always* will be—till death. The good angel of Mercy takes me in her arms; as I have written, your happiness was all I was living

for and still is. I want you to be happy, as I have always told you and if it is to be with someone else—why I will try every way dear, to help you. God bless and keep you. God make you the happiest girl in the whole world, as that has always been my ambition, and I only ask that when you are so happy that once in a while you may think with tenderness of one who loved you more than life itself, of one who will always be caring, and will be eating his heart away for you—the 'sweetheart of my dreams.'

Your Charlie."

In government's Exhibit 82 Major Shepard was referring to those plans for the honeymoon trip that you have read to the jury previously this morning or sometime today. Just before those letters the Major wrote and said he discovered that he was not financially able to take a trip like that and suggested that after we were married we would spend a week or so or not more than two or three weeks in the mountains near Denver somewhere at some resort and not take a trip at all except go up there, and I wrote back and told him if that was the true condition of his financial status, that he should have—

Mr. Class: Just a moment; not what this witness wrote to the Major, it is not the best evidence.

The Witness: I was just trying to answer the question he asked me.

Mr. Wyman: She is entitled to state what she wrote him. We have not the letter.

Mr. Class: We have it. You may read it later.

The Court: Do you want the government to produce her letter you have?

Mr. Class: We will produce it, but we will object to this witness testifying to the contents of the letter.

274 The Court: If you have the letter, I presume, in order to get the conversation, or the communication, it would be all right for her to state what is in the letter. You have, you say, seen it, and you have it. I suppose the government could subpoena you, and ask you to produce the letter.

Mr. Class: Save an exception.

The Witness: I cannot, your honor, unless I testify what was in my letter, I cannot answer the question they asked me.

The Court: Tell very briefly.

Anyway, I showed resentment, I will not go into detail, in the fact that the Major had not told me, or lead me to believe that he was financially able for us to take a trip such as he had outlined, one of those four outlines you have produced before the jury and in substance I made the statement in my letter you have and told me he could not afford the trip; in the first place it would not make any difference to me, but I resented the fact he lead me to believe he could afford a trip like that and then after I had expected or anticipated that trip for a number of months and then writing the letters suddenly telling me he could not afford it, I accused him of not being frank, and I probably made it quite strong. That is what the quarrel was about in other words. (Government's Exhibit 81 identified as being a communication received by the witness Grace Brandon from the defendant C. A. Shepard.)

Mr. Wyman: The government now offers in evidence Exhibit 81.

Mr. Class: The defendant objects to the reception in evidence of government's Exhibit 81, for the reason it is immaterial, appears to have been written on or about March 15, 1930, too remote, and long after the month of June, 1929, and does not tend to prove or disprove any issue, and wholly irrelevant for any purpose.

The Court: Overruled, and save an exception.

Mr. Class: Save an exception.

Mr. Wyman: I should like to call the jury's attention, on the envelope is the postmark, March 15, your honor.

The Court: Very well.

(Government's Exhibit 81 marked and received in evidence, made a part hereof, and read by Mr. Wyman.)

(Government's Exhibit 81 written in ink and same handwriting as signature, read to the jury and dated March 15, 1930, on the envelope.) Government Exhibit 81 is as follows:

"Friday evening.

275 "My Darling Sweet Girl. Your precious letter of Tuesday came this afternoon—(radio playing 'I want to be happy but I wont be happy—till I make *you* happy too.') That is my lifes work darling—to make you happy. Glad you received my letter of Saturday—yes you must be getting or have already received my letter telling you how badly I felt at not hearing from my sweetheart. Yes, your dear special delivery arrived last evening and it was surely 'delivery' for me—de-

livery from the despair and gloom I was in darling. Our weather is warm & just like spring too—you say you would love to be here in my arms, and listening to the radio. My precious—how happy I would be to have you there it would be more than heavenly to me sweetheart and your wishing it too makes me want you more dear. How I will hold you dearest in a few months the most precious bundle of loveliness in the world. Why wouldnt I keep up the widows & orphans fund for you dear. Arn't you everything in the world to me and why shouldn't I take care of you, or arrange that you be taken care of in case I have to leave you. Glad you want me & love me so much—I love you so dearly—darling! Glad you have the syllabus all finished dear—it has been quite a strain on you, and am glad it is over. Note that you had your picture taken for a fashion show. How wonderful, my sweetheart is going to show the new styles. Do you have to furnish your own costumes, dear? Where and when is it to be held, sweetheart? Are you going to send me the news with your picture in. I want it dear and a picture of you taken at the studio if they give you an extra one. I cant have too many dear. Be sure and tell me all about it and what you wear—you know what ever you do, or even think, I am so interested in sweetheart. So sorry you lost your gloves and had to purchase another dear—some one there must have picked them up. Sorry my darling was so tired—do wish I could have been there, held her in my arms so closely—and taken away that tired feeling. Know you would have felt better, wouldn't you have dear? Too bad your eyes are hurting you—perhaps it was on account of the extra strain you had to put them to all week. Do you wear your glasses dear? So brother was kind of homesick for mother's cooking, was he—don't blame him a bit dear, I would be too!

"I was up at 6—bathed and shaved—had breakfast read paper and as I started out of the bldg. met the Chaplain—he said 'Good morning, this is a swell morning.' I said—'it was.' He looked at me and smiled—'It is for you anyway.' I said 'it was the most glorious morning I had seen in a long time.' He said—'your face shows it'—so darling see what your love does for

me—makes others notice how happy I am. Was in the C. M. S. office today and Major Cooper said he had spoken to Col. Brown about the leave. Cooper started to laugh, I asked what was the matter. He said when he showed Brown what I wanted, Brown said 'what in H— does he want to leave for he has only been here a short time. Cooper said why Col. he wants to get married. Col. says Oh then give him what he asks for' so I guess that is one worry out of the way sweetheart —we have one months leave and the others get two weeks except in exceptive cases—dont know yet of anyone else getting over two weeks. Well my darling will close and go to bed. Hope I dream of you tonight —for you are always in my arms in my dreams. I love you so dearly sweetheart!

Always your Charlie."

(Enclosed with letter:)

276 "Good morning Darling. It is now 6:40 Sat. morning. I had to say to you and whisper to your picture that I love you. Had a sweet dream dear—you were in my arms and we were sharing our love together. How happy we both were. Wish I could see my sweetheart this morning. I am enclosing some more style clippings dear, maybe I have sent some of them before. Also a clipping regarding the proposed pay bill cut out of the Washington Sun. Have marked the part that would refer to me. Would increase my salary from $450.00 with allowances to $600 a month, allowances included, with deductions if occupying quarters. Thought you would like to read it dear. Another one of those clear cool Colorado mornings—makes me want to go for a long ride in the mountains with my sweetheart. Wallins are coming after me tomorrow to spend the day with them dear, then Monday is the dinner & dance here & Tuesday dinner & bridge. Wish you could be here to go with me dearest. Well will close & go to breakfast. Just an extra love message before breakfast to my darling—all the love in the world from one sweetheart to another.

Always yours,

CHARLIE.

Denver
Mar 15
12:30 PM
1930
Colo.

Miss Grace L. Brandon
2604 So. Presa St.
San Antonio
Texas."

(Government's Exhibit 83 identified as being a communication from the defendant C. A. Shepard to the witness Miss Grace Brandon, being a letter postmarked March 12, 1930, and read to the jury.)

Mr. Wyman: The government now offers in evidence Exhibit 83.

Mr. Class: May it please the court, it appears on the envelope of this exhibit, that the postmark of this is March 12, 1930. Defendant objects to the reception in evidence of government's Exhibit 83, for the reason that it is immaterial, that it appears on the face of the letter that the letter was written long after June, 1929, too remote, it does not prove any issue in this cause, and is irrelevant to any issue.

The Court: It may be received.

Mr. Class: Save an exception.

Mr. Wyman: I will read it, your honor.

(Government's Exhibit 83 is similar to the letters
277 heretofore referred to as to endearing terms. In this letter is also mentioned the question leave and that he will be able to take the month of August, also mentioned the fact he will pay up the two chattel mortgages on the car, also from letter. In it he states that the suspense is killing him. He can neither sleep, eat or attend to work, that he would gladly give his life for her, and is heart broken and sick all over):

"If I don't hear sweetheart by Monday, after you have read my special letter & this one, can come to no other conclusion than that, as far as you are concerned, all is over. Not for me dearest, for as I wrote will always continue to love you—but will not let you know—not bother you. Everything I have given you was because I was, and am, in love with you—nothing for the value of things, though I have always tried to get the best

for you—but for the love behind it all. But it looks as if it was all in vain, so will have to carry my load. Major Ingold (?) asked me at the table if I was sick today. I said 'no', but no one knows but Dear God above, how sick I am. Well dear will close. I will post this, though I was going to hold it until I heard from you. Dear, I have humbled myself—have gone on my knees to you, imploring you to forgive me, that I was so sorry—what more is to be said—only my great fault has been, being so sensitive.

"With all the love in the world.

Your CHARLIE.

"Box 278 DENVER
Fitzsimons General MAR 22
Denver Colo 3 PM
COLO

SPECIAL DELIVERY

Miss Grace L. Brandon
2604 So. Presa St.
San Antonio, Texas."

(Government's Exhibit 50 is also identified as being a communication from Major Shepard to the witness Grace Brandon and was read to the jury.)

Mr. Wyman: The government desires to offer in evidence government's Exhibit 50, in six pages.

Mr. Class: May it please the court, defendant objects to the reception of evidence of government's Exhibit 50,—The postmark is Denver, March 13, 1930,—for the reason that it is immaterial, the letter evidently written long after the death of—long after June 15, 1929, and too remote, and does not tend to prove any issue in this case, and is incompetent and irrelevant for any purpose.

The Court: Overuled.

Mr. Class: Save an exception.

Mr. Wyman: I desire to read the exhibit to the jury, your honor.

(See also testimony of R. R. Hochwater.) Government's Exhibit 50 dated March 12, 1930, written in ink and same handwriting as signature "Your Charlie" at end of letter, was read to the jury and is as follows:

278

Wednesday evening, 7 p. m. 3/12/30

"My Darling: Well another long dreary day has passed, and a lonesome evening is before me. You

remember what I used to write dear, how long the days were, when I didn't receive a letter, with what delight I looked for your letters, and what happiness they brought me. The days were all cheery & bright, when I could expect one, now so many long days have passed without a word—and how lonely the days have been dear. Even a wire, which always used to be answered, with a love message in return, remains unanswered—ignored. Well I have tried to make amends dear—have done what I could to atone, but not being able to see you—or hear from you, am at a loss to know what I can do further.

"I was up at 6 this morning—wrote to you after the bridge party last night, it was one o'clock when I went to bed. I woke up at 3—turned on the light and studied your picture—didn't sleep after that, but just thought & thought. Had a shower, breakfast & went to work at 7.30, busy at all the wards till 11.40, went to post-office, on a fruitless mission, then to clud—had a glass of milk—couldn't eat any lunch—then intended to read but was too restless—dressed & took the bus to town; tried to find something for you in the new style arrivals. Sent you a box of Bauers candy for St. Patrick's Day then had Mustetters send on to you the blue chiffon dress I had laid away for you. I had intended the sport suit—'Glen Bougie' as a surprise, had paid a deposit on it to hold it—blue, your *color* dear! Thought it would be so serviceable to wear on the train & boat trip, as well as in auto—but as there wasn't and won't be any such trip for me now, decided to send it on to you to wear as you wished to—so had them send both on to you together. I put a card in each one—just from habit dear—I have been so accustomed to sending a message of love with everything I gave you, that I just coudn't help it. If they have offended you tear them up dear—and forget, thought I suppose now that isn't going to be hard to do. I don't know as you will ever see these lines dear one, but will write daily or at least will put down what I am doing, thinking & saying—as *you always* wanted me to do. I can't offend you anymore by what I write, so you probably will never read this. I thought I was free to tell or say anything to you—whether I was sad—happy—disap-

pointed or joyful—but it seems I wasnt and overstepped. Well I am punished for it. I know now what a prisoner feels when he is shut away from the blue sky and sunshine—the sunshine of my life has been taken from me—there is nothing worth living for, and it makes me long for the end. Well dear, am going to read some of your old letters and be happy in them for a little while, to help pass the sleepless night. Have felt badly all day—worrying always did hurt me—make my stomach worse so it isn't any wonder that I am upset. Well Grace, will never know what I am suffering for my mistake. She, perhaps, tonight, is at the Plaza or Gunter having a good time & with not a thought of me—happy in the arms of someone else. I wonder how much a man can stand—why one has to suffer so—and she always felt or said she felt so for me. To repeat phrases in her letters—'I wouldn't hurt you for the world;' 'I love you better than life
279 itself;' 'Would have loved to take you for a ride;' 'Glad you are lonesome for me, I should love to be with you;' 'Glad all of your thoughts are of me;' and best of all *'Certainly darling, all of my love will always be with you.'* I thought she meant that, and how happy I was when I read it again 'You are the best and dearest person in the world;' 'Am so lonesome for you;' 'Always your sweetheart;' and speaking of the love message Sunday, 'What a wonderful love token dear! I kissed each flower as I placed it in the vase and tried to imagine it was "my sweetheart" instead!' Did you love me dear, when you done that—then why such a change in a few hours?—'Wish I could see you—am so lonesome, I love you more & more all of the time, sweetheart'—would that she would say that to me now! Again, 'How precious of you Charlie dear, to make love to my picture; I envy that picture, its nearness to you, in your room & so near to you all the time.' 'Would love to see you so much'—and yet hasn't written me a line for 8 days.

"Again, 'It makes me very, very happy dear, when you tell me how much my love means to you, sweetheart of my dreams.' 'I would love to be there to have you whisper lovely things in my ear, darling.' 'Yes darling, it will be "heavenly" when you can come

again, and we can tell each other so many lovely secrets, and share our love.' 'Would love to have you hold me in your arms.' 'My picture you loved so much' —wonder where it is tonight and if you have looked at it this past week, or is it turned to the wall or put away—as I have been. Your last letter started out 'Sweetheart of my dreams.' How happy we were sweetheart—what is to become of me, after such a taste of happiness. Will have to go & take a dose of medicine for my stomach. What a lonely life there is for me now. I have talked to the chaplain—told him of my love for Grace—that everything appears to be over between us—he feels or seems to feel so sorry—wanted to know if he could do anything that he would write to Grace. I told him that it wouldn't do any good, that she has ignored my letters & wires—so whats the use.

"I can see now if I had slept over her letter, the one that hurt me so, I wouldn't have been angry—would have known by the letter following that she didn't mean it—but it is too late—regrets now for my mistake is too late. When I look at her picture—the dearest thing in my possession—with the words in her writing 'with much love to my sweetheart.' I just cant face the world alone. I want her so much—oh how I have loved her—what a different world she had made for me and to think by my anger I have forfeited it all. Well, no one is to blame but myself—

" 'Thats why I ask the Lord, in Heaven above
What is this thing called "Love"
When love flew in my window
I was so happy then—
Tell me, who can solve its mysteries.'

" 'It was so wonderful, so wonderful to be in love with you,' and the gown I had selected for that wonderful night of Aug. 4, what is to become of it, and the black lace chiffon, blue lace chiffon dresses and tweed coat, all of which I spent so much time in picking out for my sweetheart—on all of which I have paid a deposit—suppose the order of the stores are I must take them, as I may have prevented a sale of them—what can I do with them. I had visualized how pretty & sweet my darling was going to look in

them—thought I would be the first to see her in some of the things, but that dream too is over. Suppose I will have to sell them for what I can get, after I have finished paying for them.

280 "5.30 a. m., Thursday. My Dearling: for you still are to me. Your precious picture, which you said you envied for being so close to me—what a source of satisfaction it has been to me in these silent days passing on. When I look into those dear eyes, see that smile & then read the words below—I can't believe what seems to be happening. Those eyes full of love for me—no wonder I have always made love to that picture. The love, of which you said would be mine for *always*, is still shining there dear, and I will go on believing that until you tell me, or send me some word that I am wrong. I took a sleeping powder at 10.30, went to bed to read for a few minutes—kissed those dear lips good night and slept till 2, when being wide awake & my brain seemed ready to burst from thinking, took another & slept till 4. What a blessed relief they give you—to put you to sleep—to blot out those torturing thoughts that seem to press on you so. I am still dizzy from the effect of them, but that will wear off when I get out in the open air. Poor Mrs. Roycroft took an overdose to get out of her misery. I can see what a relief it will bring. I am miserable, lonesome—oh so lonesome dear, and sick, too. Can't you have pity on me, haven't I suffered enough from your silence, suspense and the knowledge of my wrong? They say to err is human—to forgive divine. I know I am only human dear, and you are highminded & divine enough to forgive if you would only sit down, to go over everything and come to a realization of our love for each other. For I know that you *deep* in your heart, you *still love* me, and you know too, that I love you *so* dearly. I have appealed sweetheart, to your sense of *justice*, to your sense of *honor*, for your *forgiveness* and now appeal to your LOVE. I have and do love you more than anyone in the world —know that you loved me too, dearly, then why darling can't my offense be forgiven? I have told you I was sorry—that such a thing will never come up again—then why dear? I can still feel those arms around

me—your kisses linger still, and will through eternity dear—can't you feel an answering response to my love? So many many times, in reading over your letters last night—you have written 'Please, oh please dear, for *my* sake be careful of yourself.' I know when you wrote those words that you meant them, they showed me you *cared*, and they made me very happy. *Don't you still care, dearest?* I will ask you now, repeating your own words, 'Please, oh please, sweetheart' tell me what I want to know. Send me a wire at my expense and end this uncertainty, if it has to be that—oh, I can hardly write it dear— if I have to lose the most precious treasure in life to me—I want to know, and if it is to be that, will not write anymore, but will still go on *caring*, for as I have written you so many times dear, and have always signed my letters, my love will always be yours, whether yours will be mine or not. For in the words of the song, I have loved you not for just an hour, not for just a day, not for just an hour—but *always!!* Don't you still believe that dear—where I look again at that dear picture I know you do— your love was too enduring to be snatched away like this. Your heart is not made of stone, dear—it is of flesh and blood, the same as mine, and can't help but respond to the appeal of love!

"Hoping and praying darling Grace, that you can do as I ask, forgive & forget—and let us be happy in each others love, as we have been.

Always till death

Your CHARLIE

"Again, I wasn't going to send this—but just can't help it, dear."

(Newspaper clipping enclosed with letter):

"POISON FOUND TO HAVE KILLED MRS. RAY-
281 CROFT. Death of Army Doctor's Wife is Attributed to Self-Treatment. Poison was found Wednesday to have killed Mrs. Edna Raycroft, who died at her home at Fitzsimons General Hospital two weeks ago.

"Mrs. Raycroft was found dead in bed by her husband, Maj. Harold V. Raycroft, a physician.

"Toxicologists of the Denver General hospital and Fitzsimons experts have been making a careful ex-

amination of the viscera of the woman, while an investigation has been conducted by army authorities, Joel Stone, district attorney of the first judicial district, and Sheriff Lee Templeton of Adams county.

"Mrs. Raycroft's death was laid Wednesday to her secret treatment of herself without advice of a physician or knowledge of her husband.

"It is believed the officer's wife, who was a nurse, had been taking a powerful drug to allay nervousness caused by continued illness. An overdose is said to have resulted in her death."

Government's Exhibit 85 in two pages handed me is a communication received by me from the defendant Charles A. Shepard. (Government's Exhibit 85 marked, offered and received in evidence and is a letter written to Grace Brandon from the defendant C. A. Shepard and is written in ink in the same handwriting as the signature at end of letter "Always your Charlie".) (Government's Exhibit 85 is a letter similar to the ones heretofore quoted containing endearing terms and news around Fitzsimons Hospital.) Government Exhibit 85 objected to, overruled and exception saved, same ground of objection as Exhibit 83.

Government's Exhibit 84 in seven pages handed me are communications which I received from Major Shepard.

Curtis McCoskey, recalled as a witness on behalf of
282 the government having been previously sworn and examined, testified further as follows:

Government's Exhibit 62 handed me, I have seen before. I bought it. I gave it to my sister, Mrs. Shepard, as a Christmas present in the year 1927. Mrs. Shepard was the wife of the defendant.

(Government's Exhibit 62 is the Gold-plated Mesh Bag identified in the testimony of Grace Brandon.)

Kathryn McCoskey, recalled as a witness on behalf of the government having been previously sworn and examined, testified further as follows:

Redirect Examination by Mr. Brewster.

Q. Mrs. McCoskey, I hand you the government's Exhibit 58, and state if you have ever seen that?
A. I believe I have.
Q. Whose was it?
A. Mrs. Shepard's.
Q. The wife of the defendant?
A. Yes, sir.
Q. And your husband's sister?
A. Yes, sir.
Mr. Brewster: That is all.
Mr. Kagey: No cross examination.

Gertrude Crowe Skow, recalled as a witness on behalf of the government, having been previously sworn and examined testified further as follows:

I have been on the stand before. Government's Exhibit 60 handed me, I have seen before. Mrs. Shepard had a pair that looked exactly like these. Exactly like them.

(Government's Exhibit 60 is the Crystal Bead necklace identified in the testimony of Grace Brandon.)

Government's Exhibit 63 handed me, the pearl necklace, Mrs. Shepard had some exactly like these. I do not know that I ever saw her wear them, but she showed them to me.

Cross Examination.

It was sometime before her death Mrs. Shepard showed the necklace to me.

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283 Jane Leader, recalled as a witness on behalf of the government, having been previously sworn and examined, testified further as follows:

I am not able to read my notes at this time because I have a severe headache.

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284 John R. McDonald, recalled as a witness on behalf of the government, having been previously sworn and examined testified as follows:

When on the stand before I testified relative to having to go at different times in the apartment where Mrs. Shepard

stayed and saw her at that time in the forenoon, afternoon and evening. I saw Mrs. Shepard frequently; when she first moved into Carpenter Court, we were both taking our meals at Arnold Hall and went back and forth from Carpenter Court to Arnold Hall; frequently she rode with me in the car; breakfast between 7:00 and 8:00; lunch at 12:30 and dinner at 6:15 in the evening. At different times I would meet her in social gatherings. After her husband returned I saw her at different times. I have seen her and her husband together. I never at any time, at all of those times ever noticed any indication of her intoxication or drinking. As to her manner, I considered Mrs. Shepard a most immaculate appearing lady, very much of a lady always, never saw anything that suggested drinking. As to her dress and personal appearance, I thought she always made a splendid personal appearance. I never at anytime saw her when she was intoxicated.

Mr. Class: No cross examination Captain.

Alice McDonald: recalled as a witness on behalf of the government, having been previously sworn and examined, testified further as follows: I have seen Mrs. Shepard about her housework at all times of day, both while her husband was away and after he came back. I met her at social functions, but not very often. I have seen her both morning and night about her housework. She always presented a very lovely appearance, always dressed very nicely and very immaculately, especially so. I never saw her when she appeared to me, she had taken a drink of liquor, never in all the times I saw her. I never saw her when she appeared in any way to have been under the influence of any intoxicating liquor.

Q. Did you ever hear any report around the fort,
285 prior to her sickness, that she was an habitual drunkard?

A. No.

Q. Or a secret drunkard?

A. No.

Mr. Class: Just a moment; she has not shown herself competent to testify as to what the general reputation is, in any specific instance, as to whether this person or that person, or any person, said anything about it. It is not proper. General reputation may be inquired into, we concede that.

The Court: He was not asking about reputation; he asked if she heard any reports.

Mr. Class: That goes to reputation.

I never noticed her at anytime when she was slovenly in her dress. There was never at anytime her face appeared red or inflammed. She played Bridge and she did quite a bit of needlework. I saw her working on a hooked rug. She seemed very much interested in her home.

Cross Examination.

I am the wife of Captain McDonald who was just on the stand. We live upstairs, above Major Shepard. We lived there for nearly two years and in the same quarters with the Shepards from September until the following September. We moved in at the same time, the quarters were new and newly opened. That was in September, 1928. My husband has been in the Army 13 or 14 years.

Grace Lee Brandon, was recalled as a witness on behalf of the government and testified further as follows:

Mr. Class: I called upon the District Attorney to produce a letter dated in March, Saturday evening at 6:00 p. m. and about which some discussion was had last evening and this morning.

Mr. Brewster: With pleasure (handing paper).

Mr. Class: Thank you.

Cross Examination.

Government's Exhibit 84 handed me is a letter in the handwriting of Major Shepard. I received that exhibit. As to
the time I received it I would have to look at it for
286 a few minutes before I can tell you. I have marked
on here, or had marked on this envelope, 4-10-30 and my memory of it at that time when I turned this letter over to the Department of Justice of San Antonio, Texas, was fresher on the subject of the date of the receipt of this letter, than at this moment and I feel sure it is an absolutely correct date because I initialed it in my own handwriting. I said the first time I met Major Shepard was along about November 1st of 1928 in San Antonio, around 6:00 or 6:30 in the evening. I have been in San Antonio most of the time since August, 1924, I went to school there. I had been steadily employed since approximately April, 1928.

I met Major Shepard at Mrs. Wylie's rooming-house. There were about four other Army officers roomed there at the time. I was introduced to Major Shepard by Mrs. Wylie. I do not recall that the number of boarders increased while I was there and while Major Shepard was there. I was the only woman besides the landlady. To the best of my recollection the other officers, the Lieutenants invited me out occasionally. I did not go out with any of the others in the evenings, before I met Major Shepard. Major Shepard is the only one I ever went out with.

Q. Did you not say yesterday—

A. He said, "I do not suppose you want to go out with these lieutenants, but how about going with me?"

Q. He used the words, "go out with a major?"

A. I am not sure; he might have; I think he said "going with me." He might have said "major" but I do not remember exactly.

I told him I would think it over. I consulted with Mrs. Wylie. Mrs. Wylie had already told me Major Shepard was a married man and when he asked me to go out with him I think he told me he was. As to going out with the Major I asked Mrs. Wylie's opinion, if she thought it would be all right or should I not do it or something in substance, whether she approved of it. She approved of it. It was after I went out with Major Shepard that he said anything to me about his domestic affairs. He mentioned something about it the first time I went out. On the first occasion I think
287 we went to dinner some place in San Antonio, to a show, as well as I remember it. As well as I remember it was on that occasion he spoke to me about having communications that his wife was drinking too much and matters of that sort. I had known him about a week at that time. From then on I went out with him two or three times a week until he left, to a dinner or picture show or something of that sort.

He mentioned his domestic troubles once or twice after that and about the fact they were not congenial.

A Doctor Sayre, a first Lieutenant, in the Reserve Corps, and a girl friend of his went with us on the trip to Laredo. We went in Major Glenn's automobile. Major Glenn did not go along. We went through Laredo, Texas, to get to Neuvo Laredo, the Mexican town across the border. I imagine it is 175 or 180 miles from San Antonio. We left San Antonio

at approximately 7:00 A. M. and got back a litle before or after seven o'clock in the evening of the same day. That was either Thanksgiving day or the Sunday following. We had lunch in this little Mexican town and then went around to all the little curio shops where Mexicans sell items to tourists. We went to a bar. We all had a very small glass of what was supposed to be Port Wine. The party sat at a little table. Major Shepard ordered the wine.

Q. Somebody proposed a toast?

A. The major did, to me. He was talking to me in a low tone of voice; then Mr. Sayre was talking to the girl he was with.

. . . . . .

Q. And that was the substance of this plighting of the troth they refer to?

A. Yes, sir.

After we returned from this trip I think it was four or five or six days, that Major Shepard left. Every time I was out with Major Shepard on these various trips he would tell me I was a nice looking girl and how well he was pleased with my appearance and demeanor.

Q. The major was very gentlemanly about those
288 matters?

A. Yes, sir, he was a perfect gentleman in every way; and perfectly courteous.

Q. Would you say that he made love to you?

A. Only verbally.

Q. He did not try to caress you, or anything of that kind, did he?

A. No, sir.

Q. When the major left, there had been no engagement, had there?

A. No, only this: He had asked me if I would marry him if he got a divorce, and I replied I would.

Q. He told you, at that time, he could get a divorce in any State in the Union, did he not?

A. He did not mention any State whatever, Mr. Class. He said he could get a divorce four or five years ago, and did not have any motive for getting it, he had every ground in the world for a divorce. He did not say anything about "States of the Union". Before he left we had some arrangement about corresponding. He asked me if I would write

to him and I replied I would, and of course he wrote to me on the way up on the train on his return to Fort Riley, and he—he wrote to me the day he arrived at Fort Riley as well as I remember. I do not remember whether it was the first letter he wrote after he got back to Fort Riley, but shortly after he wrote that his wife had run up so many bills, giving wild parties, and most of the money had been spent for liquor, that he had borrowed money to pay the debts he had contracted. He said nothing about her physical appearance. He sent me this ivory set for a Christmas present a few days before Christmas, yes sir.

Q. And you considered that it was a very appropriate present for you, under those circumstances; that is to say, not so expensive a gift that you would refuse to accept it?

Mr. Brewster: We object to this as argumentative.

Mr. Class: I have a right to ask this witness concerning these presents they have introduced in evidence. The witness—

The Court: The witness may answer.

A. I considered Major Shepard so much of a gentleman that he would not be offering me a present that was not appropriate under those circumstances.

289 Part of the second set was broken and I had it replaced because it was insured. The Major also gave me a ring for my Birthday which was on February 23rd.

Q. That was this $10.00 affair, was it?

A. I don't know; he wrote me he paid $25 for it, and it was insured, or registered for that amount, if I am not mistaken.

Q. And you accepted that present from the major for the same reason, that he was a thorough gentleman, and you knew that he would not present you with anything that was not appropriate and proper, under the circumstances?

A. That is the way I felt about it.

I imagine Major Shepard sent me a valentine on February 14th, he was always very thoughtful and always remembered every holiday, any occasion of that kind. Later, he sent me a canary and cage from Omaha. The only thing I know about the delay in getting the canary is, I was called on the phone by the Express Company, looking for my address.

Q. Coming on down to the date of Mrs. Shepard's death, did the Major write you or telegraph you that Mrs. Shepard had passed away?

A. As well as I remember, he wrote a few hours after her death.

Q. In that letter he told you that he had done everything he could for Mrs. Shepard, did he not?

A. He did.

Q. —during their entire life?

A. Well, no, sir, he did not state that; he stated in a paragraph as I have stated in my testimony before, he said that "I have to tell you that Mrs. Shepard passed away, passed peacefully away, either two hours or two and one-half hours ago, and I suppose it is the best thing; as she suffered so severely during her last illness, but my conscience is clear, as I have done all I could for her, and it could not have been helped." In substance that is what he wrote as well as I remember it. The Major came to see me along in July of that year, 1929, he came to San Antonio and I saw him. At that time he stated he was anxious to get transferred to the Air Service. I knew that that carried an increase of 50% in salary before he mentioned it. While in San Antonio in November 1928 Major Shepard told me he had an opportunity or possible chance to be transferred to the Air Service by an exchange with a brother officer there. Later he told me this officer changed his mind and would not exchange.

Q. Did he tell you at that time, that he had wired Mrs. Shepard asking her if she could pack up her goods alone, and if he could make that exchange?

A. No, he did not say anything about that to me, at all. He did not mention it, but he might have done it.

Q. You would not say he did not do it?

290 A. I don't remember such a statement.

When he was in San Antonio in July he did not tell me he was down there for that purpose, to get transferred. No, sir, he told me he came down to see me, personally. He told me he went to see several brother officers about that matter, while he was down there. To the best of my knowledge he left for Fort Riley after he had been there about three days. After he returned to Fort Riley I had further correspondence with him.

(Defendant's Exhibit F identified as being a communication by the witness to Major Shepard and offered and received in evidence.) Defendant's Exhibit F is as follows:

"10-13-29. At the ranch.

"My dear Charlie: Am so sorry to have delayed so long in writing to you, but a lot has happened since I wrote you on the 5th. I received four letters, which had been sent to S. A., after I posted my letter to you: Monday I received three letters from you, dear; and this morning at 3:00 a. m. I found five letters from you in the p. o. box.

"I received my beautiful ring from Hertzbergs on Monday, October 7th; I love it very much and think it is lovely, dear! I told my family that an old lady friend of mine, with whom I used to board, gave it to me—and that 'fixed everything all right.' They all think it is a beautiful ring, too. You surely have good taste, dear, in choosing the ring!

"I note the diet list you included in your letter of September 29th, dear. I am always interested in the most minute details concerning you, so thanks so much for sending it. I am glad to know that you are getting
291 a variety of appetizing foods.

"Note that you ask 'Will I be glad to meet you in Fort Worth;' why, my dear, I shall be overjoyed to see you again! Surely you know that!!

"Note what you wrote regarding my changing my room—I have often thought of doing so, but I have never fully decided to move, as I do not have another place in view—shall have to decide about that when I return to S. A.

"You write that you do not understand why I do not want you to skate—I only thought you would not be strong enough when you came down to S. A. and I surely do not want you to injure yourself in anyway; however, if you feel strong enough to skate, why I'll be glad to go—but if you do not feel like skating I shall not skate any while you are there, dear, as I want to be with you all I can.

"I imagine you will like it better at Riley now that Col. Ruffner is C. O.; everyone at Fort Sam Houston and Brooks Field seem to like him very much.

"Glad you have your new overcoat, as you will be needing it soon, I imagine; it must be nice from description, dear.

"It is nice that you enjoyed the movie you went to, dear; it must seem nice to be able to go out again.

"Am sorry that you cannot get the food you should have at E-6 in the mess-hall; perhaps you ought to go back to tray service in D-2, dear.

"It makes me very happy to hear of the nice things others have said about how well you look, dear! I hope you look even better than when I saw you in July. I'm expecting to see you looking fine—when I meet you in Fort Worth, dear!

"Note that you write that you are sending me a book to read on the train; thanks a lot, dearest, I'll be very happy to receive it, and I'm sure I'll enjoy reading it since you found it interesting. You are always so thoughtful. I love that trait in you, dear!

"No, the Alamo country club is not the one beyond Fort Sam Houston, the one you are thinking of is the S. A. country club. The Alamo is nine miles northwest of S. A., about one mile west of the Fredericksburg Road. You asked how I got out to the club; I go with some friend or friends who happen to be going out for a game of golf—a girl friend, Lena Dykeman, plays golf three afternoons each week and I usually go out with her. She has a Hupmobile sedan. I was taking three lessons per week; on Monday, Wednesday, and Friday. Note that you write that you will have your clubs with you and that we can have a few games—I shall enjoy playing golf with you, dear!

"You asked if I intended to write every day and did I want you to continue to write every day; yes, dearest, I want you to write every single day as you have been doing. I had intended to write to you each day, but so much has 'come up' in the last week or ten days that it has been absolutely impossible for me to write—as much as I wanted to. I shall tell you in detail of my 'doings' since the 5th, later on in this letter. I want to answer all questions and remarks in your letters first, dear.

"Note, what you write about my wiring you for money for my trip home. I thought of doing that, dear, but thought that you might not wish me to bother you. I shall greatly appreciate your taking care of the loan for me, dear, as it will help me out *so much!*

Yes, dear, I believe I really need you to take care of me, and *ma* glad you want to. No, dear, I did not get the 'Roller seed' for Sammie, as I would have had
292 to order it by mail from Omaha; I bought some fresh seed from 'Ferd Staffel's Bird House' in S. A., which is supposed to be good. I did not know that you would like to have gotten the seed for 'Sammie'—next time I'll let you get it, if you wish to, dear. Am sorry that you are peeved, dear. I'll ask you for things in the future—wait and see, dear!! Yes, I left word at the S. A. post office to have all my mail forwarded to Midland, and I have received five of your letters, which you had sent to 2604 S. Presa St., S. A., so I suppose I have gotten all you sent.

"Note what you write about where to mail your letters; as tomorrow is the 14th, and this letter won't be mailed till some time tomorrow, it will be the last one I shall mail to Denver. I shall mail the other to #132 Junction City, Kansas, as you requested, dear. After the 21st. I'll mail all letters to the Texas Hotel at Fort Worth.

"My home is on the ranch, dear, although Dad has some property in Midland. I have one brother aged 21 years; who is six feet tall on his bare feet; weighs 170 lbs. has dark brown eyes and dark brown hair which is inclined to be wavy. I have one sister aged nineteen years; five feet tall, weighs 135 lbs.; has very blonde hair, slightly red on top, very blue eyes and extremely fair complexion, which freckles when exposed to the sun too long. She has been married, too, last March; has a baby boy ten months old, named Charles Vertner Cook; my sister's name is Mrs. Wm. M. Cook. The baby is plump and healthy looking; quite pretty I think; has large gray eyes and light brown hair that is getting darker. I named him Charles for you, dear. His middle name is for his father.

"My sister got her divorce on infidelity; it is too bad, since she is so young.

"I am happy to know that you already have 'my other ring,' dear; but I'm afraid it will be too large. as Mr. Murray said I wore a size 6 when he measured my finger for my diamond; the diamond fits perfectly,

too. My dinner ring was a size 8 and I had to have it cut down to fit the third finger on my left hand—now I shall have to have it made a little larger to fit the third finger on my right hand. I expect the wedding band should be a wee bit bigger than the diamond, perhaps a 6½, although I am not sure. I am sure the orange blossom design in platinum that you selected must be beautiful, dear. Am glad you were able to get a good discount on it, too!

"So happy that you are getting stronger every day, dear, and that you do not tire so easily now.

"It is too bad about the car, dear, I hope you have arranged for the bank to refinance it by this time. The car is so pretty and nice I would hate very much for you to lose it or your equity in it, either. Glad you are coming down to see me anyway, dear.

"The mountains must be beautiful now, dear; I should love to see them and I know I would be happy there with you, too.

"I received the medicine Monday and wish to thank you a lot, dear. I am sure it will save me a lot of unnecessary pain and shall take it according to directions. That is another token of your love and thoughtfulness, dear.

"No, dear, I have not given up my rooms at Wylie's but the packing I wrote about was some clothing and other articles mother had asked me to get for her in S. A., as there is a better selection there than in Midland.

"Glad Col. Burns thinks you are looking fine, dear. I believe you are doing right by being very careful about your diet—you must not get sick again, dear!!

"Yes, I, too, wish I could make the trip with you to Colorado Springs. Glad the weather is so nice there. It is nice that you have the opportunity of taking those
293 long drives because as you wrote, they will help strengthen you, dear.

"Glad you had such a pleasant day and enjoyed the drive and game dinner. Those outings are fine for you, dear! Those places you mentioned sound very interesting, and I hope to see them sometime with you, dear. Am so happy to know that you are thinking of me all of the time; I think of you *so* often, dear!

"Having your niece in Denver makes life more pleasant for you, dear.

"The reason I came by bus instead of on the train as I had planned was that I would have made the trip in one day from S. A. home if the bus had not broken down at Mason, Texas; although the bus is a lot more tiresome than the train. If you leave S. A. at 9:00 p. m. you arrive in Midland at 10:55 the next morning—so I thought I was going to save time by coming on the bus.

"No, dear, we do not go to town for our mail every day; usually we go twice per week. So try not to be too disappointed at not hearing from me so often this month.

"No, dear, I did not buy any golf clubs, just borrowed some for practicing, and thought I would buy some when I learn how to play better.

"Oh yes, babies are sweet, even though they are mischievous, but just the same I do not want to be bothered with them!!

"Glad you wrote two letters on the 7th, dear, as I cannot receive too many from you! It is nice that Capt. Holcross is going to meet you in your car at Fort Riley, dear.

"No, Dad does not have a radio so I did not hear the ballgame you wrote about. Am glad you heard it and enjoyed it so much—hope you can hear all of the coming games, dear.

"Note what you wrote about having two snapshots taken for your pass. I shall love to have one dear!! Yes, I'm anxious, too, to learn what the decision about the car is. The weather has been quite cool or cold for the last two days—which is better than the heat. I'm so lonesome to see you, dear; and am glad you are lonesome to see me, too!

"Am sorry that you felt badly during the night and had to take a powder—did it make you feel better?

"Note that you are still taking the sunbaths; are they helping you, dear? Yes, I wish I could see you now, dear!! Am glad you want to see me so much. I did not know October 9 was your birthday—in fact I had no idea when it was. Sorry I did not know in time to send you something, dear. I'll give you an

extra hug and a lot of kisses when I see you, dear. Will that help make up for a birthday present? Years make no difference, if the spirit is young. Am sorry that I have been unable to get letters off to you every day but shall do the best I can now.

"My headache is gone now and I'm feeling all right.

"Now I shall try to tell you what I have been doing since Oct. 5th. My brother and I went to town late Saturday afternoon and I mailed you a letter; went to the doctor to get some medicine for my sister, who has had a nervous breakdown as a result of worrying over her divorce. She was ill when I got home, but did not get seriously sick till Sunday at 1:00 A. M., Oct. 6th, when my brother and I had to drive to Midland after the doctor and get back at the ranch at 5:00 a. m. The doctor gave her something to make her sleep. Mother, my brother and the doctor took her to San Angelo, a distance of 110 miles, at 9:00 a. m. Sunday. Monday, Oct. 7th, at 2:00 p. m. the doctor at the clinic in San Angelo thought my sister was dying
294 and five doctors and one nurse worked over her for three hours pumping oxygen into her lungs to save her—she finally revived; my brother returned to the ranch as soon as he got mother to the clinic in San Angelo—so when my sister got worse one of the doctors telephoned for us to come at once. Dad, my brother, the baby and I left the ranch at 12:30 p. m. Monday night and got to San Angelo at 4:30 a. m., but as my sister was resting all right the nurse wouldn't let us see her and we went to a hotel and slept till 10:00 a. m. Tuesday.

"The doctors at San Angelo said they had done all that they could for my sister—that her only chance was for us to take her to Dallas to a sanitarium there—we left San Angelo at 3:00 p. m. Tuesday, Oct. 8th and arrived at the sanitarium in Dallas at 5:00 a. m. Wednesday. After leaving my sister at the Sanitarium, we went over to one of my mother's sister's home and after breakfast we all went to sleep, as we were completely exhausted from the worry and driving all night. We drove through in the car.

"We left Dallas Saturday at 9:30 a. m., Oct. 12th and

came by a little town, Midlothian, to see another sister of my mother's—we only stayed there one-half hour, then drove on to the ranch, arriving here at 5:00 a. m. this morning, Oct. 13th.

"It began to rain on us at Mineral Wells, Texas, and gradually got worse, which made us drive slower than we intended to. All of the road is paved except twenty miles, which was so muddy and slick that it took us 1½ hours to drive over it. Then the road to the ranch from Midland is not paved and it rained harder down here than anywhere else—therefore it took us 2 hours and 15 minutes to drive 30 miles—we got stuck one time and Dad and my brother had to put pieces of branches off of mesquite trees in the road before we got started; we also had a 'blow-out' and Dad and brother had to put on the spare. We surely were glad to reach the ranch.

"My sister is at the best sanitorium in the state; the doctors are nerve specialists; it is costing Dad $50.00 per week to keep her there. Poor girl! I hope she gets well soon.

"We are having a time with her baby as he was a breast-fed baby and had not been weaned. He cries so much now that she isn't here to pet him and care for him. I suppose he will be better humored in a few days. I am so worried about 'sister'; the doctors said she was resting quietly when we left—mother is distracted—just worried sick; so I have to care for baby Charles and keep house, too.

"One of my cousins came home with us from Dallas; he is fifteen and his name is Lawrence Davenport. He is a nice youngster but that makes one more to cook for, as mother always did all of her housework. Lawrence is a lot of company out here, as it is terribly lonesome and would be worse if I wasn't so busy.

"With all of the love in the world

From your GRACE.

(Envelope)

"Major
Fitzsimon's Gen. Hosp.,
Ward E-6
Denver, Colorado.

(Postmark:)
Midland, Texas
Oct 14 9.00 p. m., 1929

G. L. Brandon
P. O. Box 884
Midland, Texas"

The ring referred to was an engagement ring.

Mr. Class: Q. Miss Brandon, the ring to which you
295 referred was an engagement ring, was it not?

A. Yes, sir.

Q. When was that, Miss Brandon?

A. A few days after I went home to visit, during October, 1929—it was the first week, I believe, in October.

I do not have the ring with me, it is in San Antonio, Texas, and was not turned over to the Department of Justice. I first saw the Major, I believe, the last day or two of October. He was in San Antonio at that time for ten days or two weeks. I went out with him almost every evening and afternoon that he was there. With reference to some quarrel we had at that time, I stated I went out a few times with another army officer while Major Shepard was down there, and Major Shepard resented it very much. That was Major White I went out with. Major Shepard told me something to the effect he did not think that was quite fair as long as I was wearing his engagement ring. It was not a serious break; Major Shepard resented it and became very much upset about it.

Defendant's Exhibit G shown me I feel sure I wrote and it bears date October 30, 1929, addressed to Major Shepard. The initials "G. B." is on the stationery and the stationery was sent me by Major Shepard as a present.

(Defendant's Exhibit G offered and admitted in evidence.)

(Defendant's Exhibit G is a letter from Grace Brandon to the defendant beginning "Dear Charlie"—she thanks him for a check and says she called his hotel four times, she also expresses her love for Major Shepard. Also states if he was about her age he would understand her viewpoint. Letter ends up as follows: "I will always love you, dear, but I can't understand. Always your Grace." Envelope: "Major C. A. Shepard, Room 1241, Gunter Hotel. Gunter Hotel, San Antonio, Texas, Oct. 30, 1929, 8:05 P. M. Bell Captain.")

Q. What was the amount of that check, and what was it for?

A. Before I went home, in October, or the last day of September, 1929, Major Shepard had asked me I believe what was I going to do on my vacation, and I replied, I was going to spend it with my family at home, as I had not been home in several years, or quite sometime and he offered to send me a check for the transportation to my home.

Q. That offer, however, came in response to a letter
296 in which you said to him that, if he did not furnish you some money, that you would not be able to go home at all?

A. I do not remember.

Mr. Brewster: Wait just a moment; the letter is the best evidence.

Mr. Class: Very well, we will produce it.

Mr. Brewster: All right.

The letter defendant's Exhibit G is dated October 30, 1929, and I think he arrived there on October 29, 1929. To the best of my knowledge we had a quarrel shortly after he arrived.

Defendant's Exhibit H handed me is the check referred to in the letter.

(Defendant's Exhibit H offered and admitted in evidence without objection. It is as follows:

"Junction City, Kans. Oct. 20, 1929. No. 149.

First National Bank 83-130, United States Depository
Pay to the order of Miss Grace Brandon $50.00 Fifty and no/xx dollars. Charles A. Shepard
Endorsed: Grace Brandon, Mission 3862-J, 2604 So. Presa, 15 on acct.")

After writing this letter, to which I have just referred, I believe it was the next afternoon I saw Major Shepard. I think he came by the house in his Chrysler Sedan. I do not know whether we "made up" at that time, or not; we did before he left. He quarreled for several days over jealousy for this other Army Major, Major White. This was after I had received all these presents given to me prior to this time and while I was wearing his ring. Then, the subject of a car came up. At that time I believe I had been going back and forth with one of the girls from the field, but I was paying her the same bus fare. I imagine Brooks Field is three miles from San Antonio.

Q. You mentioned to the major that the other girls had cars, did you not?

A. No, sir, I did not; I do not remember having made that statement, because the major was there first, you know—I would not mention a car to him.

Q. Never mind.

A. I cannot answer the question, if you do not let me do it in my own way.

Q. Oh, well, Miss Brandon, I want you to answer 297 the question—

Mr. Brewster: We object to that.

The Court: The witness was answering your question, and you did not permit her to finish her answer.

Mr. Class: Very well, proceed.

A. The first time a car was mentioned was in November, 1928, and Major Shepard said, "I dislike to see you riding in public conveyances, and I wish I could afford to get you a car." It was mentioned a number of times in correspondence, letters, to me. He brought it up again in November 1929 when he was there—

Mr. Brewster: Wait until she finishes.

Mr. Class: I thought she had finished.

A. (Continuing) I had been borrowing this other Army officer's car, that he got jealous of, that is, in the evening, for a shopping trip down town, or sometime, and he found out about it and he said he would make arrangements to get me a car, whether he could afford it or not, and the up-shot of it was, he turned in the Chrysler—

Q. And procured for you a new Buick Coupe?

A. Yes, sir, he did.

The new Coupe arrived to the best of my knowledge, November 22, 1929. I signed the notes along with the Major.

Defendant's Exhibit I shown me dated Naovember 22, 1929, and signed by "Grace" is a letter and envelope I addressed to Major Shepard.

(Defendant's Exhibt I offered and admitted in evidence and is a letter dated November 22, 1929, and addressed to "My dear Charles." In this letter she told him what she had been doing; somebody had seen her ring and said it was beautiful. She also said Mrs. Wylie gave her a pain because she had been interferring in her affairs because one day she would tell her she should marry Major Shepard and the next day Major White, and also told her she would be making a

mistake to be marrying a much older man. The letter ends as follows: "Darling, I am so happy in thinking of you and hope you are thinking of me too. What have you been doing and how are you feeling, dear? Oodles of love, Always your Grace." Exhibit I also has the envelope addressed "Major C. A. Shepard, Ward E-6, Fitzsimmons Gen. Hos. Denver, Colorado.)

Defendant's Exhibit J shown me is a letter I addressed to Major Shepard and bears date of November 23, 1929.

298 (Defendant's Exhibit J was offered and received in evidence without objection. In this letter defendant's Exhibit J, witness Grace Brandon thanks Major Shepard for the car and tells him how wonderful it is. She also states "The alcohol was $1.50 and Mrs. Wylie let me have her garage for $1.50 per month. She also states she will have to get a new 1930 license, which will be about $15. She also asks his opinion about having a heater installed, stating that it would cost $4.00: She also states that she is very much interested in what he is doing this year, as it will be what we will be doing this time next year. She also thanks him for the pajama ensemble that he has laid away for her. She also states "Note what you wrote about your transportation, dear; Darling I am so sorry that things are so inconvenient for you; perhaps you shouldn't have given me the car—I don't wish you to be unhappy or uncomfortable, even though I love the car, dear." She also thanks him for flowers and the card and a purse. Letter ends up "I love you so much, dear, my thoughts are for you only, dear Charlie!! Always, your Grace." Envelope shows address Major C. A. Shepard, Ward E-6, Fitzsimmons Gen. Hos. Denver.)

I received the telegram he sent when he had to go to the hospital in August, 1929.

Q. So that it was along, we will say, in September or October, that you and the Major made it up to get married, and he presented you with an engagement ring in September or October, which was it?

A. No, it was not.

I received the ring the first week in October, as well as I remember it.

A. There were a number of flowers; to which ones do you refer?

Q. The ones in the latter part of 1929 and the first part of 1930?

A. I received flowers before that time Mr. Class, and after the Major went back to Fort Riley in November, 1929, I received flowers every Sunday or holiday or special occasions, continuously from the time Major Shepard left Fort Riley in November until March of this year. On Christmas, 1929, I received a number of presents from the Major.

(Defendant's Exhibit K identified, offered and admitted in evidence without objection.)

299 (Defendant's Exhibit K, is a letter from witness to Major Shepard dated December 10, 1929. She remarks that $50 seems expensive for him to pay for a room and bath. Also says the doctor bill is $10 and the medicine at the drug store $1.35. Also acknowledges receipt of "surprise" package containing the pearls for Christmas. Also thanks him for Post Office Money Order for $22 for automobile license. Letter also says "Yes, sweetheart, if you wish to and it will make you happier—I shall be glad for you to get me 'the gown' you mention." Also thanks him for his picture. Also states "I do not wish you to sell the silver, linens and rugs—not until I see them anyway." Also in letter, "How wonderful, Sweetheart, for you to have the lovely evening wrap and coat set aside for me—I know I shall like them very much, because you have such exquisite taste in everything, dear. You are too wonderful to be true, dear." Letter also states she has worn her Japanese pearls a number of times. Letter ends "I love you, love you, dear. Oceans of love. From your Grace.")

I received the fox fur piece from Major Shepard December, 1929, as a Christmas or New Year's present. The evening wrap Major Shepard sent me was exchanged for this fur piece. It was $79 I think. I later received some presents from the Major for my birthday, in February, 1930.

Defendant's Exhibit L shown me is a letter I wrote and addressed to Major Shepard at about the date it bears February 23, 1930.

Defendant's Exhibit M shown me is a letter written and addressed by me to Major Shepard on about the date it bears, December 6, 1929.

Q. Thank you.

A. You're welcome.

(Defendant's Exhibits L and M offered and admitted in evidence without objection and read to jury. Defendant's Exhibit L is a letter headed "Sunday, 2-23-30, my birthday, My darling Sweetheart." Letter thanks him for telegram containing the Birthday Greetings and his "beautiful chest",
also lounging pajamas. Also Chinese kimona. Also
300 hose. Also for two nightgowns. Also two pairs of dance sets. Also states when she returned from upstairs, found the six beautiful American Beauty roses and Sword Point fern; and acknowledges the beautiful Greeting on the card. Also tells about other presents received from her family. Letter further states she is going to a party of twenty-four people because she is twenty-four years old today. Letter is signed "a world of love to 'My Charlie' from your Grace". This letter contains in addition a diary of the day's events and the usual endearing terms as heretofore referred to.)

(Defendant's Exhibit M is dated Thursday 12-6-29, and begins "My Dear Charlie". She states she would love to have the book "The Devil and the Deep Sea". She also asks how he is feeling since he went to work and wants to know if he has heard from his request for a transfer. Also states she is getting eleven miles per gallon from her car and is going to get some Prestone for it, and that it will cost about $3.50. Also says: "I would like to get the license as soon as possible in order to avoid the rush, dear, do you wish me to mail you the various bills for the car, and then mail me a check for the total amount and let me pay them, dear? You told me when you were here that you wished me to do this, do you remember, dearest?" The letter ends "you know, dear, I believe I would like a black broadcloth with fur collar and cuffs—I saw some lovely ones at Jaspers this afternoon. Oodles of love from your Grace.")

Defendant's Exhibit O, handed me, is a letter I wrote and addressed to Charles A. Shepard on about the date it bears, August 26, 1929.

Defendant's Exhibit P is a letter I addressed and wrote to Charles A. Shepard about the date it bears.

(Defendant's Exhibits O and P, offered and received in evidence without objection. Defendant's Exhibit O is dated
August 26, 1929. She states she is going to see a
301 picture show, "William Powell, in the Green Murder Case". The letter also states "The letter you enclosed

from Major Stickler is lovely, dear; I'm so glad that he is such a true friend of yours and I have felt as he does all of the time—I was only worried on your account, as I was afraid you would worry and that would delay your recovery, dear. I suppose you wish to answer the letter from Major Strickler, so I am returning it herewith." Letter also says "You are very wise and sensible, dear, in your outlook on life; I have not learned to be resigned to whatever happens, but hope to learn to reason things out as beautifully as you do, dear. But I am going to hope for the best in all things." Letter also states "I imagine this standstill in your improvement is due to the worry caused by that *old* letter." Letter also states "surely I mean it, when I say I love you, dear!! I would love to see you *so much*! Why I'll tell everyone that I am engaged to you, when I start wearing my ring—isn't that what you want me to do, dear? I'*ll* shall love to wear it all of the time.")

I do not remember in my conversations with the Major talking about books or literature except one time in November, 1929, when I stated he gave me two or three books, that he found so really interesting and said he thought I would like them. Out at dinner and at different places he talked about authors and the types of literature in which he was interested. I do not remember his calling my attention to any particular author. William Powell in "The Green Murder Case" was a motion picture in the talkies. I have gone to few mystery or detective plays. That was never much of a fad of mine; I did not have anything else to do. I read these detective stories because the Major sent them to me and I expressed appreciation because I thought it would please him. I never read "The Canary Murder Case". The last two or three of these books he sent me I did not read, because that was after the Major was arrested and I did not get an opportunity to look through them. These
302 books were turned over to the Department of Justice.

(Defendant's Exhibit P, having been identified is dated Friday, 11-29-29, 8:30 P. M. and starts out "My Darling". She states she had been out to dinner and won a bridge prize for ladies and gotten sick on some food and had called Dr. Cade. She also acknowledges receipt of a box of candy. Also states "The Japanese pearls are perfectly lovely, dear." Also states she gave Mrs. Wylie his check for garage rent. Also thanks him for new stationery and monogrammed bridge

cards. Letter also states she will follow his advice about catching the chain of her mesh bag in the clasp. Letter also states "How dear of you, Sweetheart, to look at those evening wraps for me! I would love to have the red velvet you described, dear. I know it must be lovely, and would keep me so snug and warm in the evening this winter. The fitted case would be so nice to use for over night or week-end visits with girl friends, dear, what colors do they have? I would like a brown (to match my wardrobe suitcase)." Letter also states "I told everyone Dad gave me the Buick, as we had agreed." Letter also states that Mrs. Wylie charged her $1.50 a month garage rent and that she has arranged to buy gas at 11¢ per gallon at the field, and ends: "With oodles of love, from your Grace." Letter also contains diary of day's events and endearing terms heretofore referred to.)

Defendant's Exhibit Q, shown to me, is a letter and envelope addressed by me to Major Shepard on about the date it bears, January 8, 1930.

(Defendant's Exhibit Q, offered and received without objection, begins as follows: "Wed. 1-8-30. My dear Charlie: I was so happy to find your letters of Saturday when I got home." She admonishes him about his cough and tells him he must not get the pneumonia. Also tells him to please send plans for using the car part of the time on honeymoon. Also states she wore silver fox fur to a banquet of the Junior Business and Professional Women's Club at the St. Anthony Hotel and that they had Senator Ridgeway talk.

She also states that as requested by him she is en-
303 closing an itemized car expense account for a total of $13.94. Letter ends "Much love, always your Grace.")

Defendant's Exhibit Z, shown to me, is a letter I wrote to Major Shepard on or about the date it bears.

(Exhibit Z is dated September 14, 1929.)

Q. "It certainly pleases me to know your blood-count is almost normal. Glad you are improving so rapidly, and that the hospital has lifted all restrictions. I am sure you will enjoy the freedom. It is wonderful that you are feeling better. You will soon regain your strength and normal weight, and feel like a million dollars." Does that refresh your memory as to the time when the Major went there, if it was around August 1, and that he was on his way to recovery about the middle of September?

A. As I have stated before, he had to go to the hospital

when he was first taken ill, which, I believe, to the best of memory and belief, was the last few days of July, 1929, and he, I believe, was considered on the way to recovery sometime in October, 1929.

As to whether he was recuperating or convalescent when he mailed these itineraries I do not know, he presumably was at the Fitzsimons, since he used their stationery, it was sometime from July to the latter part of October, 1929.

Defendant's Exhibit U, shown me, is a photograph of myself and I sent one to Major Shepard for a Christmas present just before Christmas, 1929. I put this legend on it. (Defendant's Exhibit U offered and received in evidence without objection.) Mr. Class read the legend to the jury, "With much love to my Sweetheart, from Grace".

Defendant's Exhibit Z is a letter I addressed to Major Shepard about the date it bears.

(Defendant's Exhibit Z, dated September 14, 1929, offered and received in evidence without objection. It is dated Saturday, September 14, 1929, and begins "My dear Charlie". She states "It certainly pleases me that your blood count is almost normal." It also states "Yes dear, I think I shall enjoy living in Denver." She states "About your staying here at Mrs. Wylie's: I would rather you stayed some place else—
would look better, I believe, however you may do as
304 you wish. Oh! Mrs. Wylie, like a lot of young or I
should say women who have been married for a number of years—has been running around with several different young bachelors—she has gotten so that she goes with practically every student (M. C. reserve) that stays at the house; she started it in January and has gradually gotten worse." Also states "Am happy, dear, that you want to see me so badly! I wanted my ring now, dear, but of course do as you wish". Letter further states "Yes, a honeymoon trip comes only once in a lifetime, as you wrote; but my dear I do not want to count and plan on something we won't be able to afford—and I really, truly want to have the nicest trip possible." Letter also remarks that bird has been singing a lot better. Letter also contains endearing terms and remarks about other subjects. Letter ends "With much love, from your Grace".)

(Defendants Exhibit R marked and received in evidence and read to the jury.)

(Defendant's Exhibit R begins "Tues., 1-14-30. My Sweetheart". She acknowledges receipt of a check for $14 and also a will which she says she will keep locked up in a safe place and states it was nice of him to make it out to her. Also acknowledges receipt of box of Bungalow candies. Also states she wears her engagement ring to work and in the evenings, in fact most of the time, except around Mrs. Wylie. Also states she did not go to Club at the Y. W. C. A. because their Secretary, Miss Brown, just died of pneumonia. Letter also states "Yes, dear, I want you to pay the $6 for Dr. Cade's bill—but had already told you about it, so that is why I did not include it in my itemized gas bill. Just do as you wish. I will appreciate you paying the $6 if you wish to, Sweetheart. It is very, very sweet of you Darling, to want to give me a monthly allowance; but of course it is not exactly necessary until we are married, dear heart. However, after we are married, Sweetheart, I shall love to have an allowance of my own, dear." Letter ends "With all of the love in the world to 'My Darling' from your Grace." Letter also contains endearing terms as to other letters and many other subjects.)

Defendant's Exhibit X, in three pages, are checks
305 and I got the money on them from Major Shepard.

Mr. Class read same to jury. One is dated Junction City, August 31, 1929, for $15 payable to Miss Brandon. Another dated December 17, 1929, for $11.35 payable to Grace Brandon and the third is a check dated March 3, 1929, payable to Grace Brandon for $22. Defendant's Exhibit X, marked and received in evidence without objection.

Defendant's Exhibit T called to my attention is a clipping of the "San Antonio Evening News," dated March 13, 1930, and I recognize on that exhibit a picture of myself (witness points out picture), I mailed that to Major Shepard. Defendant's Exhibit T marked and received in evidence. (Exhibit T is a picture of witness Grace Brandon in fashion show with other girls.)

Defendant's Exhibit Y, marked and received in evidence, was read to the jury.

(Defendant's Exhibit Y is dated 2-1-30 and starts out "My Sweetheart". It is a long letter containing endearing terms and a diary of daily events. Letter also acknowledges receipt of his letters of Saturday, Sunday, Monday and Tuesday and thanks him for literature on Niagara Falls, Buffalo, New York, Toronto, Canada and New Orleans and states she

is sure she will enjoy their honeymoon. Letter also encloses itemized expenses for the car in total sum of $22.70. She says Dr. Cade charged her $3.00 for each call and that the medicine was $1.65, making a total of $7.65. Letter ends "I thought you would like to know; dear; I'll appreciate you paying it if you wish, but if not that is all right dear. With worlds of love to the dearest Sweetheart in the world! From your Grace.")

I received a number of gifts around February 23, 1930, a walnut veneered cedar chest, silk lingerie, and also two dresses. The pajama ensemble I have not produced because it has been worn and discarded.

Q. Do you remember a letter which we read this
306 morning, which referred to the pajamas?

A. You have read so many, I do not remember.

Q. Yes, we did; I do not remember, the pajama ensemble?

A. That was in the cedar chest.

That was referred to in this letter as a part of the trousseau.

(Defendant's Exhibit S offered and received in evidence without objection. It was read to jury.)

(Defendant's Exhibit S is dated Monday, 3-10-30, and begins "My darling Sweetheart, Please, please forgive my delay in writing, I have been terribly busy at the office for the last week." She asks forgiveness for not writing or telegraphing and says she is sorry. She further speaks of enormous work she is doing at the office. She acknowledges receipt of "The Black Circle". Further states she has not had time to read it, but states she is sure she will like it as his taste is excellent. Letter further says "Note what Major Cooper told you about leave, dear; I think he is unreasonable—everyone takes a month for a honeymoon—so, why should he take the attitude that two weeks is enough, dear? As you told him, we could not go anywhere in two weeks." Witness remarks in this letter about the date for the wedding being in August. Letter further states "Now about your Special Delivery letter, dearest, I am sorry that you thought my letter cruel, unkind and uncalled for, dear; I certainly did not intend it to be any of those things—but was trying my best to get you to tell me exactly where we stood financially, so that I would know what to expect and not have to plan any more and then have the plans smashed at the last moment—can't you understand how I felt and what I meant, dear? I am terribly sorry my letter upset you so much, dearest. Of course dear,

you must know I still feel the same about you!! I love you very very much. Am glad you received the key to the golf bag, dear. Just forget the letter, dear, I am terribly grieved to have upset you so much. However, you wrong me in saying that my love for you is not strong by my suggestion that we postpone the wedding. I have known several friends who postponed weddings for some reason and they were madly in love with each other too. You mean more to me than anyone else in the world, Sweetheart—" Letter further states "Darling, don't you know you must not worry and that you really must eat your meals—if you don't you'll be sick in bed again!! What will I do way down here, knowing you are ill?? Please don't worry any more?? Am terribly sorry you did not sleep Monday night." Letter states "Shall be very glad to have the book 'Cobra Candlestick' when you have read it Sweetheart." Letter ends "I am so lonesome for you and love you so much Sweetheart, more than you can know! Always your sweetheart, Grace.")

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Mr. Class: Q. Miss Brandon I show you defendant's Exhibit AA and ask you simply if that is your signature?

A. Yes, sir, it evidently is.

(Defendant's Exhibit T marked and received in evidence and read to jury.)

(Defendant's Exhibit T is dated Thursday, 3-13-30, and begins "My darling Sweetheart". Witness states in letter how hard she has been working on a syllabus on "Theory of Flight" at the office. She acknowledges receipt of a Special Delivery letter and thanks him for check. Letter states "That is perfectly wonderful of you, sweetheart, to have had a lovely blue chiffon dress laid aside for me, dear. I wear an 18 size (don't know what size a 38 would be) anyway, dear, I wear a 36 inch brassiere, but have wide hips which an 18 size sometimes won't fit; suppose a 38 size would be all right, Charlie Dear. I know the dress is beautiful, Sweetheart. Darling I always want you to tell me everything, because I love you and tell you everything. Won't you keep on doing that dearest? With all of the love in the world from your Grace.")

Defendant's Exhibit AA marked and received in evidence being as follows, to-wit:

Defendant's Exhibit AA.

"San Antonio, Texas, March 29, 1930.

"Rothgerber & Appel, 630-633 Symes Bldg., Denver, Colorado.

"Gentlemen: I have just read your letter of March
308 25th and in reply wish to state that all items referred to in your letter have been worn, consequently dry cleaned and pressed. The dresses have been cleaned two times and pressed several more times; the pajama suit has been laundered three times, and has a torn place at the top of the trousers in front at the seam in yoke. In view of the above statement it would be useless to return these items for credit on the account of Major C. A. Shepard.

"I feel that it is extraordinary and absolutely uncalled for that you should write me about this matter at all. In the first place I did not purchase these garments, but received them as a gift from my fiance. According to the newspapers this man is to be carried in the Army as a Major until he is convicted of the very serious charge against him, therefore, he will be on the Government payroll until that time. If these garments have not been paid for, I would suggest that you get in touch with the Finance Officer at Fritzsimons and collect this person's account in that way. I had no idea these articles were not paid for. As far as the publicity is concerned, I have been advised by legal authorities that all gifts, letters, etc., received from the man in question will be made public at the trial, so there is nothing I can do to stop this awful publicity.

"I am very, very sorry that this account has not been settled, but it is not my account and I was not responsible for its being opened, therefore, there is nothing I can do about it. I shall be obliged to ask that you do not annoy me further about any of this man's affairs.

"Thanking you in advance for your compliance with my request and hoping that you receive full payment on this account, I am

Very sincerely,

(Signed) GRACE L. BRANDON."

Mr. Class: Q. Miss Brandon, I show you defend-
309 ant's Exhibit W, and ask you if you sent that wire to Major Shepard?

The Court: Just a moment; the spectators all will have to keep order here, or we will clear this courtroom. You may proceed.

Mr. Class: Thank you, your honor.

Q. On or about the date it bears, March 17, 1930.

A. (Examining paper) I sent a message, but I do not believe this is a true copy of that message. There is one place inserted here, which I, to the best of my remembrance, knowledge and belief, I did not put in here, and there is one put in here that is not here.

Q. You think that is wrong, do you?

A. Yes, sir, in one respect, I do, the one phrase here, "Report came from Kansas City," I feel positive I did not put in. I put in, I feel positive, "They suspect you." I feel quite positive about that, I put that in, where that phrase is, before I put the "stop". I put "What does it all mean?" to the best of my knowledge, remembrance and belief.

Q. There is a phrase there, "What does it mean?"

A. I do not believe that is worded the way I put it, not to the best of my knowledge and belief.

Mr. Class: We offer it in evidence.

Mr. Brewster: We object to this; it is not the original telegram.

Mr. Class: I am willing to insert the words the witness says should have gone in there.

The Court: It is not subject to admission, if it is objected to, of course.

Mr. Class: The objection is, it is not the best evidence.

The Court: I think that is a good objection to it, if counsel insists upon it.

Mr. Class: The witness has just stated, may it please the court, that, in one or two places—

The Court: That is a matter you will have to settle with the district attorney. If he insists on his objection, it will have to be sustained.

Mr. Class: I think the witness may testify as to what she did put in, if she wishes to amend.

The Court: If you cannot get the original, I suppose the witness can testify, but the objection is, this is not the best evidence.

Mr. Kagey: We would not have to produce any telegram. We could ask her, "Did you send a wire to him?" We would not have to do that.

Mr. Brewster: I object to the address.

Mr. Class: Q. The word "George" on there was intended to be "Grace?"

A. Certainly, the one I sent had "Grace" signed to it.

Mr. Class: Gentlemen, I will read this Exhibit W.

(Defendant's Exhibit W marked and received in evidence, made a part thereof, and read by Mr. Class, being in words and figures as follows, to-wit:)

Defendant's Exhibit W.

"Western Union

"Received at 915-919 Seventeenth Street, Denver, Colo.

1930 MAR 18 AM 6 10

"PSA26 49 NL- San Antonio Tex 17

"Major Charles A Shepard, M C

"PO Box 278 Fitzsimmons Gen Hosp Denver Colo

"Received three packages Saturday thanks very much stop Messers Lawrence and Davis from Department of Justice interviewed me with regard to cause of death of Mrs. S stop They suspect you stop Report came from Kansas City am terribly upset embarrassed and bewildered stop What does it mean love answer

GEORGE."

This telegram was sent around midnight of the day I
310 had been interviewed about the case by Mr. Lawrence and Mr. Davis of the Department of Justice of San Antonio, Texas, which was around 3:30 in the afternoon. That was the first intimation I had that there was anything suspicious surrounding the death of Mrs. Shepard. The interview lasted an hour and a half or two hours. I still have the Buick Coupe. It is in San Antonio.

Mr. Class: We offer in evidence Exhibit 84.

Mr. Brewster: If there is any part we object to, we will call attention to it, when we come to it.

Mr. Class: I understand it is received now.

The Court: Yes; no objection?

Mr. Brewster: We object to that part of it which are quotations of letters received by Major Shepard from outside people.

Mr. Class: That goes to the copy?

Mr. Brewster: No, any part of the quotation. Nobody is objecting to anything that Major Shepard wrote, that is in that letter, but we do object to where he tries to show that some gentleman wired him about this case.

Mr. Class: It is part of the letter, that is the only thing.

The Court: The objection is sustained.

Mr. Class: Save an exception. We will have to take a moment to read it, if that is your honor's ruling. Of course, we will take an exception to the ruling of the court.

The Court: Proceed.

Mr. Class: I shall have to read it myself—no, I do not need to do that, maybe I can get them started on it.

The Court: You can mark the controverted part, the quoted part, there.

Mr. Class: That is what I was trying to do, and save me the trouble of reading it.

The Court: Just mark them, if you want to use the copy you have.

Mr. Kagey: There are about 8,000 words in this letter. The only thing we object to is the Holycross letter.

Mr. Brewster: Wherever it sets out letters written by strangers, in reference to this case, where it simply quotes them, that is, of couse, hearsay.

The Court: You better read it yourself, so there will not be any question about it.

Mr. Class: I was trying to save myself a little hard work.

The Court: Oh, a little voice will not hurt you.

Mr. Class: It may be, if I give one of these young men the first page, it may be that I can catch up with them.

The Court: Yes, all right.

Mr. Class: If your honor will bear with me just a moment.

The Court: All right.

Mr. Brewster: They did not read all of this letter.

Mr. Class: We will read all of that letter. We did not quit.

Mr. Brewster: Yes, you did quit.

Mr. Class: At this time, may it please the court, defendant offers in evidence, separately, those portions of the government's Exhibit 84, which, under the ruling of the court, were not received in evidence.

Mr. Brewster: To which we object, at this time, as incompetent and immaterial.

The Court: I understand those are quotations, or copies, from letters that were stamped or written to the Department?

Mr. Class: That is right.

The Court: —by other people?

Mr. Class: That is right.

The Court: The objection will be sustained.

311 Mr. Class: We save an exception.

The Court: You are through with this letter, are you?

Mr. Class: Not with the witness.

The Court: Are you through with the letter?

Mr. Class: Oh, yes, your honor.

(Short recess.)

Mr. Class: As a part of the cross examination, may it please the court, we offer in evidence defendant's Exhibit CC. As I understand it, there is no objection.

The Court: It will be received.

(Defendant's Exhibit CC marked and received in evidence, made a part hereof, and read by Mr. Class, being in words and figures as follows, to-wit:)

"Denver, Colo. April 5, 1930 No. 32

"The American National Bank of Denver

Pay to the order of San Antonio Buick Co. $37.00

Thirty Seven and No/100 - - - - - - - Dollars

For Buick payment

Harry S. Class

For deposit only pay to the order of City-Central Bank & Trust Co., San Antonio, Texas, 396 San Antonio Buick Co."

Government's Exhibit 84 received in evidence and read to the jury by Mr. Class is as follows:

Government's Exhibit 84.

312 "Saturday evening—6 P. M.

"My sweetheart: Your letter of Wednesday came tonight by the hands of Judge Class—unopened. You say that it came as a surprise as you didn't expect to hear from me at all. Did you think my love as light as that dear? Now about your wire, dear. As I stated it was opened and published in the paper before it was turned over to me. Hence my reason for anot answering at once. It too would have been read and published and caused you just that much more embarrassment. Cant you see dear I was thinking of you and trying to save you. You were interviewed by the

agents at the same time I was dear. So, as they said, there would be no collusion. I dont know how long they took with you, they finished with me at 3 A. M. when I was put in here, and here I have stayed. For the past 10 days, allowed no visitors, except my attorney. At first officers and patients came every day and it helped keep up my morale, but since than I have been thru the tortures of hell, knowing that I am absolutely innocent, confined with criminals and not knowing how you felt towards me. It wasnt until my attorney got authority from the court to take care of my mail that I could write you. I wrote once and waited for some word before writing again. Now that I have heard from you I will start my daily letters again, that is, if *you want* me to, and if *you are going* to do the same dear? Yes, I realize very deeply the notoriety and humiliation you have suffered, darling, because of our love for each other, no one deplores it more than I do. It has been, and still is, a hideous nightmare to me, something I shall never get over as long as I live. You may say you don't know what to do or believe and *'surely hope I am* innocent, as I say I am.' Do you know dear that sounds as if there was *some* doubt in your mind as to how you felt about my innocence. I have received nearly a hundred letters, all the way from California to Montreal, Canado, *everyone* stating they do not believe *one* word of it—your letter is the *only one* I am sorry to say, that says—*'I hope* you are innocent.' I didn't expect that lack of faith in you sweetheart. I felt you would be the first one to say,—'I know he *is* innocent, I *believe* in him, and will stand by him,' but your love, dear, wasn't strong enough for that was it dearest. Regarding your reason for not writing—14, 15 and 16th, that you went to the office—I don't know what it was, and for a drive Sunday and didn't *have time to write.* I remember once you said you wouldn't let anything interfere with your letters to me. The week before it was because you were working overtime and too tired, when just *one* line would have helped so much dear! Note what you say about not having said anything to the reporters dear. I believe that, dear, and told Judge Class that, and from what I have told him about you, he believes

you as strongly as I do. However, did you sign a statement for the agents of the Department of Justice? They said you had and said they had some letters. I told the Judge I didn't believe you would ever turn over any correspondence to them and still believe so, unless you tell me otherwise. Am glad the articles sent fitted you sweetheart. I had a lot of pleasure in selecting them for you, dear, don't you know! Have you worn them yet dear? Glad to hear dear that my messages of love are still appreciated on Sunday, tho you didn't say what it was. Yes when I found I couldn't write to you I asked the Chaplain to write, thinking you would know that it was a *message of love* from me. Please tell your brother for me, that I am as sorry as I can be that your name has been brought into this trouble, both for yours and his sake and that of your parents, but know that being a brother of yours, that he is fair and just, and can see that I am
313 not to blame for this. I could not tell of course what all this means in our relationship, whether you have decided to break the engagement and wedding because of the notoriety and your name being linked with mine, or that you are not a 'quitter' and intend to stand by and maintain the old standing of mutual love and trust? You say that you have forgotten how to smile —what do you think of me, dear—what long lonely hours day and night I am putting in. You are out in the God's blessed sunshine and air, while—but I won't say any more. I am so so sorry dearest that you have worried so, that it has made you sick. Try to keep up for my sake—you know I *love you.* There wasn't a word of love in your letter for me dear—were you afraid someone would see it? There is no danger now. I fully expected to be out on bond today as the Judge was very hopeful last night, but the District Attorney at Kansas City wired he wouldn't accept a reduction, but Judge Symes of the Federal Court will hear the argument Monday, 10 A. M.

"Now, I am inclosing copies of some letters received which will show you dear how some people feel about me. Again, regarding my optimistic state of mind. I am innocent, my conscience is clear—and our Heavenly Father will clear the way. About my defense, I have

one of the best lawyers in the state, secured for me by the Masons thru Major Denison and Dr. Watkins. The Masons in Toronto sent a wire to the Inspector General of the Masons here to investigate the case for them. He did so and sent back word that he was assured of my innocence. We have not given the newspapers any idea of our plan of defense. Will simply say, dear, that we have assurance of experts in their line, that Mrs. S.—did not die of this alleged cause. All the medical officers at the hospital—Mayos, Carlisle, have studied the case and reports say it is all circumstantial; and there can only be one outcome—acquittal. The Grand Jury will meet in Topeka Apr. 14th, *only the Government side is heard.* If an indictment is rendered, date of trial will be set. If I am admitted to bail I will return to duty, my salary, under regulations is stopped while I'm in the hands of civilian authorities which makes it hard for me to pay my bills. Had a nasty letter from Skow about his note but the attorney said not to worry over it, will manage in some way to quiet him.

"Now dear as to the motive for the crime. The Government says *you* are the 'alleged' motive for the 'alleged' crime, that is, that I poisoned Mrs. S. in order to be free to marry you. It is of course silly and absurd as I guess I wrote you the agents stated that I *made love to you prior* to Mrs. Shepard's death—*that I proposed to you before,* that I spoke about *getting a divorce and that you said*—they say they have your letter to me—that it was against your religion—tho you are not a catholic. If they have such a letter, don't know where it came from, unless it was stolen before the C. O. sealed my room, as they stated I had been watched for two months. Now I denied all this dear, told them there was no motive and no crime. That we had corresponded some prior to her death but that we *were not engaged until I gave you the ring in Oct.* —that I had *not proposed to you prior to her death.* I hope dear all this corresponds with what you told the agents at your interview. If *not, tell* me dear so I will know—as they are depending on the 'motive'—you, sweetheart, as they allege—to convict me of the crime that was never committed—to send me to the

chair or life imprisonment by your testimony. So you can see darling how important it is to know all you
314 said to them. I hope when you read this, that you will feel much better about the whole matter, that the letters I have inclosed will help you to have a little more faith in my innocence and help you to stand by me. Mrs. S. grandmother wrote to the C. O. at the hospital that she didn't believe *one word* of it—described habits of Mrs. S.—which has an important bearing on our defense. These borne out by Major St. Peter at Omaha, Major Southard of S. O. who was with us in the Islands and tells the same thing—he wrote to Col. Bruns regarding it himself. You will notice in some of these letters—portions are omitted—so as not to allow the other side to know. Major Southard was and is to be best man at our wedding dear—has never met you but both he and his wife are dear loyal friends. If you would like to have them see and talk to you dear, you might have a better idea of the whole matter—and a little more belief in me. Whatever you say about it. Thot perhaps Mrs. Southards sympathy and understanding—one woman to another, might put you in better spirits. Will not say anything to them until I hear from you dear. I realize I am fighting for my *reputation*—for *my life*, and with no crime committed—and you beside me—there was no motive. There wasn't any way you know that, for no matter how unhappy her habits made me, I could never stoop to hurt anyone. Col. Bruns says all this paper talk will have been forgotten in three months and that I haven't lost the confidence of anyone—no one—except it seems, my sweetheart. Now, dear about the 'pesky old lawyers' I have to have one to defend me. In fact, will have to have two, one here and one in Topeka to fight for me. There are so many witnesses & what you may hear at the trial dear, or if you have to go before the grand jury you will only hear one side, remember that—remember what I have told you I *said* and what I have written about my defense—that there is only one outcome—acquittal. It is going to be very expensive—we have to bring witnesses from California—Omaha—Riley, Denver and other places at our own expense. The Government pays their own.

Brother Geo. is helping out all he can. He is very ill and cannot come—lost $17,000 in the stock crash. The officers at the hospital have made a pool to help me and it is going to be hard sledding until it is all over. I had Judge Class send a check to the Buick people two days ago as payment on the car. Col. Clayton who used to be C. O. Surgeon at Omaha before Col. Skinner and he who retired a year ago for heart trouble—wrote today—'I am sure the trip to Denver would be detrimental, if not fatal to me. Nevertheless if I know anything that would be of help I would *take a chance on life and health. I cannot* believe you are guilty and think it most important to find out the cause of the apparent animus in this case.'

"Sunday morning. I wonder if you are saying 'Good morning' to my picture this morning, if 'Sammie' is singing a song to you for me. You haven't mentioned him for several months—and wonder what the message is that the roses bring this morning. The last one you wrote about the flowers said,—'*I kissed each petal, wishing they were* your lips and that you were here.' What will be your thoughts this morning? Wondered where you were last night, with whom. Suppose when you start your daily letters—that is if you do start—that you will tell me all the daily details as you used to? My stomach has bothered me a lot, but they sent some medicine from the hospital and I am trying to keep it in shape—meals being sent in from the outside—as I must keep up. I have had many a hard battle alone and suppose I can stand another, though never had such a one as this before. I fought—shielded and protected Mrs. S. habits, as I thought, from the rest of the world—but have found out that others have known about it. It is as well now that they did, and makes it much easier to prove.

"How about the reaction on your friends and relatives. Surely no one can condemn you, who know you,
315 for your name being involved. Simply because you loved me and we were engaged. Have your parents written you and what did they say? Did your brother want you to break your engagement, or any of your friends, and did they tell you to stand by me? Now, sweetheart you know I love you—with a love as you

wrote—*'your love is dearer to me than life itself.'* I thought then that you meant it. Perhaps you did—that remains to be seen. With all you have gone thru, the notoriety and humiliation, with what you still have to go thru at the trial is enough to make a girl wish to get away from it all. I am not and will not reproach you if you have decided to break our engagement. Your happiness is all I have been living for and if that is to be denied me—well there is nothing left in life for me. Or if this has made you turn to someone else—the paper said there was another army officer at the field who was 'interested' and who was having some pictures of you finished out there—I cant blame you. The papers here have made a lot of the fact that I haven't heard from you—(all letters going thru the office and opened). One of the reporters in the presence of my attorney, who comes to see every day, asked what stand I thought you would take. I said, 'I know you would stand by me.' Then he said—'if with all this notoriety she decides to break this engagement what would be your reaction.' I said 'That is up to her. I would accept it as a gentleman should.' I didn't tell him however what a desolate existence there would be for me but if I have to go thru it I must—thats all—'the battle wont be half so hard, if you've someone to share it' but if you are not by me—God will give me the strength to fight alone.

"I get so blue and discouraged at times—wonder what I have ever done to be punished in this way. But God has blessed me with renewed health and wonderful friends and at one time—a wonderful sweetheart—but now I don't know—but I must keep up, as in the words of the song, 'thought my heart break tomorrow, I'll be all smiles tonight.' How many hearts are hidden behind a smiling face.

"Sundays were always lonesome days for me, because I couldn't get a letter. Those three Sundays I have been in here, have been like three years. Will turn this over to the attorney to post tomorrow dear and will write every day—having him post them if I have to remain here and if I get out on bail abd back to duty, will wire you. So you can direct your letters

to the hospital again. Please return the inclosed copies of the letters, as the originals are in the attorney's files. When you answer this tell me all I have asked dearest about everything and remember, that you and you alone are in my thoughts—that my life is in your hands and that *'I love you.'*

Always,

Your Charlie.

"Wondering if you have been wearing your ring all the time or whether this trouble has made you take it off. Sweetheart, when you have answered this you had better burn this letter on account of the information about the defense, and the questions I asked you in your interview, so there will be no chance of it falling into anyones hands. I will do the same with your reply dear, for the same reason—you understand don't you?

"My dear: I have walked miles and miles in this
316 narrow corridor four feet wide in the past three weeks. There are 5 cells in a row one has toilet, one bath and other three occupied by prisoners. A narrow corridor runs in front of those divided by stone and steel bars from a larger corridor. My bed consists of a canvas hammock hung between the two side walls—no pillows—no sheets—have two blankets and use my coat for a pillow. Had my own toilet articles and towels so with daily bathing manage to keep some of the dirt off but its a terrible ordeal. There is a long table and bench where the prisoners eat—didn't have a chair to sit down on until my lawyer insisted on it. You have seen wild beasts in a cage, pacing back and forwards by the hour, and one wonders what they are thinking about. Well I can feel for them now for that is what I have done day in and day out until I get so leg weary—muscles cramping I throw myself into the hammock, sometimes fall into a fitful sleep, to wake up startled wondering where I am, and what it is all about. Am telling you this dear so you will have a mental picture of what I have been suffering and going thru, all for no cause whatsoever. At 6 a bell rings and I get washed and dressed and commence to walk—having papers and reading matter but can't keep my mind on them. At 7—my breakfast is sent

in, consists of cooked cereal, eggs, toast and milk. Leave my milk and drink it at 9:30 or guess at it, as all watches are taken away from prisoners. As for my razor every morning except Sunday, so try to keep clean. At 1:30 lunch comes—consists of milk, toast and bottle of milk; at 4:30 supper of chop, potato, baked apple and milk. At 7 comes another bottle of milk, bell rings for everyone to go to bed. The attorney usually comes about 3 or 4 and stays an hour going over letters and the case—trying to keep up my morale by telling me stories—but like you dear it is hard to smile. So while you are resting in your comfortable bed, I have been in mine, as described. So your sweetheart has suffered dear, as he never expected to have to suffer. God keep any other innocent person from going thru what I have. But thru it all I have kept your image before me and it has helped to pass many lonely hours—if I could have known or know how you feel. With a world of love—Your Charlie.

2 P. M. Tuesday.

"My Precious Sweetheart: After I had the envelope sealed I opened it up again. I cant keep my thoughts away from what you have to go thru next week. I would give anything in the world dear, if I could prevent—don't you know that? Both of us have suffered and neither of should have—some things are awfully hard to understand in this world. You have suffered humiliation—your name and picture being published and all because you loved me. It is an awful penalty to pay dear, but cant the knowledge of any *great love* take away some of the sting and shame, and the knowledge of what happiness is awaiting you when it is all over, my name cleared and yours is changed to mine. Won't that help some darling? I *hope* so dear. I know if I could take you in my arms I *could make* you feel better over the whole ugly mess.

"No, as I wrote in other portion of letter, there is no way you can avoid testifying except, in being married—for a wife cannot be compelled to testify against her husband. But that is not for us until I am cleared, of which I feel *more confident* every hour dear. Wish I could make you feel the same. I want you to know

that you will be in my thoughts *every* minute—*loving* you—wishing I could be where I could see you, even though I wouldn't be allowed to talk to you. I will write every day, so tell them at the house to look after any mail that comes while you are away, because you
317 may not have time to receive another one before you have to leave there—perhaps they won't call you now. I hope so sweetheart when you get to Topeka dear write me from the hotel, even *just a line* and then when you get back do the same, won't you? *Please—please dear,* I am asking for the sake of the *love* you did have for me, and which I surely hope is still present in that dear heart that belongs to me.

"Make your part and mine also in all this and especially up to our engagement in October as insignificant as possible, then they can't say you are the motive, or that there was any motive, for you know as God is my judge there wasn't any motive, nor was there *any crime!* God give you strength darling to go thru this, as cheerful as you can, knowing that I am loving you.

Your sweetheart

CHARLIE."

"Over" (Written on letter)

This on the reverse side:

"If a hearing is held here dear, and you are required to come to Denver, if you will write to Judge Class—you can trust him fully dear—or to Major Denison—I will arrange to have some one meet you and see that you are looked after and taken care of—I can't appear in it at all dear, as you will realize—but my friends will do for you just as I would and do it because of your relationship to me and no one will be the wiser. I will be happy in the satisfaction of still being able to care for my sweetheart!!!! *I don't want you to be alone here!* Your Charlie."

I replied to two or three letters written by Major
318 Shepard after his arrest and I believe I replied to the one dated April 7.

Q. I show you defendant's Exhibit EE, and call your attention to the date, and, for the purpose of refreshing your memory, ask the question if this was not the only letter you wrote to Major Shepard after he was taken into custody on March 17?

A. (Examining paper) I wrote this letter to Major Shepard after his arrest, and, as I said, I may have written two, and I would not swear whether I had written only one, or I had written more than one, but I wrote that one, anyway.

Q. As a matter of fact, did not Mr. Davis and Mr. Lawrence tell you not to write to the Major, at all.

Mr. Brewster: We object to this as immaterial.

Mr. Class: He is a government agent.

Mr. Brewster: The same objection.

The Court: Sustained.

Mr. Class: We save an exception, and we make an offer to prove, in the absence of the jury.

Q. Do you remember, Miss Brandon, attending the session of a grand jury in Topeka last April?

A. I do.

Q. Do you know Mr. Caffrey?

A. I certainly do.

Q. Do you know Mr. Glass?

A. I do.

Q. Did you see me in the corridor of the federal building last April, on that occasion?

A. I did.

Q. At that time, were you escorted by Mr. Glass and by Mr. Caffrey?

A. I was escorted by Mr. Caffrey alone, at that time.

Q. And while, on being escorted, did you refuse to have any interview with me, as Major Shepard's attorney?

Mr. Brewster: Objected to as incompetent, and immaterial, and not cross examination.

The Court: Sustained.

Mr. Class: May it please the court, we ask leave to make an offer of proof with respect to that, in the absence of the jury. Save an exception, of course, it being saved always. Save an exception, Mr. Reporter, to the ruling of the court in all of this.

I was subpoenaed by the United States government to attend Federal Court here. At the time of my subpoena and prior to that time, back to July or August, 1928, I have been in the employ of the United States government in Civil Service in the capacity of a stenographer. I arrived in Kansas City a week ago last Sunday. I believe I talked to Dan Helliher, reporter for the Kansas City Journal-Post one afternoon, Wednesday or Thursday of this week.

Q. In that interview, did you state to Mr. Kelliher
319 that the government agents had warned you, and commanded you, not to talk to anyone except them, and, particularly, not to talk to Major Shepard or his lawyers, about your testimony in this case?

Mr. Brewster: We object to that as incompetent and immaterial.

The Court: What is the reason for asking that question?

Mr. Class: First, with respect to the attitude and demeanor and credibility of the witness, and secondly, to show the animus and the motive of this prosecution; and to meet the statement made by Mr. Brewster, in his opening statement, that there was some "hand of fate" here; that this has been fostered, conceived and born in the—

The Court: Just the reason; do not make an argument. Objection sustained.

Mr. Class: We save an exception, and—

The Court: Yes, sir, and please do not make an argument of that kind before the jury. If you have an objection to make, make your objection.

Mr. Class: Your honor asked me for the reason.

The Court: Yes, sir, and I asked you for an objection, and not for an argument.

Mr. Class: Very well, we save an exception.

Q. Miss Brandon, I show you defendant's Exhibit FF, and ask you if you are familiar with that article?

A. (Examining paper) I gave the Journal-Post reporter an interview one afternoon this week, and I have not read the article, except the headlines, but I told them quite a lot, which I considered my side of the case, and I felt like I owed it to myself to have the interview, and I told them the truth, and not part of the truth. If they have printed it, word for word, I do not know, as I have not read the article in its entirety.

Q. You have not read the article?

A. Not in its entirety; Mr. Brewster showed it to me.

Q. Are you able to state, Miss Brandon, from what you read, whether you were correctly quoted in that article?

A. The first parts that I have read was quoted all right.

Q. What?

A. Yes; they were quoted all right, but there has been very little of it that I have read; I did not feel it was necessary to read it.

Q. I call your attention, particularly, Miss Brandon, to this portion, calling your particular attention, Miss Brandon, to the portion of this article with blue pencil around it, I will ask you to examine it and state to the jury if that portion is correct?

A. (Examining paper) I was told not to—is there objection to my answering that?

Mr. Brewster: He asked you if that was correct.

A. Not absolutely.

Mr. Class: Q. In substance, is that correct?

A. Well, it is almost so, but there is one little thing that I suppose they did not feel was important, you know. If you send an article in about a party, a reporter always changes it around to suit his views.

Q. Yes, I know that. Is there anything in the article, not what was left out, is there anything in the article which is not correct?

A. That is what I say; there is one thing that they did not put in, which I imagine they thought sounded better for publicity not to put in. I cannot say it is absolutely correct.

Q. I am not speaking of what they did not put in, but what they did put in.

A. I said, unless they put this in, it would not be exactly correct.

Q. What is in here is correct, as far as it goes?

A. If you leave something out, why it changes the content of something, does it not? I cannot say it is correct, unless they had put in one other phrase, or sentence, I told him.

Q. As far as it goes, that is all right?

320 A. Well, Mr. Class—

The Court: I think she has answered the question; leaving out part of it would change the sense of it.

Mr. Class: We offer in evidence Exhibit FF, and we offer in evidence, separately—

Mr. Kagey: Just a moment, before you do that; we move to strike out the answer of the witness, and also object and except to the remarks of the court with reference to whether or not it would make a change in the content. Of course, the court, not having seen the article, could not say whether it made any difference or not.

The Court: The court was referring to the repeated questions of counsel, that had been answered two or three times.

Mr. Kagey: Yes, I understand—

Mr. Class: Of course, I did not consider they were answers, anyhow, or I should not have repeated them.

We offer Exhibit FF as an entirety. We also offer in evidence that portion of the Exhibit FF in the blue frame.

Mr. Brewster: To which we object as not tending, in any way, to contradict or impeach the witness. She has not testified to any fact.

Mr. Class: I am not seeking to impeach the witness, at all, certainly not; I am asking this as an independent fact, with respect to what this witness experienced in that connection.

Mr. Brewster: That is not the purpose of it; here is the witness—

Mr. Class: We did not produce her; the government produced this young lady. Any statement this witness made, with respect to her feelings, or her experiences in the matter, with anybody who had authority in connection with the prosecution, is receivable, may it please the court.

The Court: Objection sustained.

Mr. Class: We save an exception.

Q. Was there anything, other than what was told you, between the date of this last exhibit, the letter, I think it was March 13, written by you to Major Shepard while you were at San Antonio, and the 29th day of March, 1930, to change your views with respect to your relations with Major Shepard?

Objected to as being incompetent and immaterial, and calling for an opinion and conclusion of the witness.

The Court: Very well. You may answer. You may answer whether there was anything to change your views.

A. You mean, my personal feelings toward the Major?

Q. Yes, for any reason other than what may have been told you by Mr. Lawrence and Mrs. Davis and Mr. Caffrey?

A. They did just what you are doing, asking me questions, and trying to pen me up, and see if I was not lying about it.

Q. I am not doing that at all. The questions I put to you—

A. I did not mean a reflection on you, but I mean that is what happened. I am sorry.

Q. I did not think you meant a reflection.

Mr. Class: We offer in evidence defendant's Exhibit AA.

Mr. Brewster: To which we object as incompetent and immaterial, not tending to throw any light on this case with reference to the relations of the parties.

The Court: What is the object of this? What is the objection?

Mr. Brewster: Objected to as incompetent and immaterial, not tending to prove any issue in the case, not proper cross examination.

Mr. Class: May it please the court, we have a right to interrogate the witness with respect to any attitude she may have; we have a right to ask this witness, or any other witness, his interest in the case, as to whether they wish the defendant acquitted, or wish you convicted, or what, always. This has to do with a witness in the case. Upon any theory, that letter certainly is receivable.

The Court: Objection sustained.

321 Mr. Class: We save an exception, and we also ask leave—

The Court: Very well.

Mr. Class: —to make an offer of proof.

The Court: Very well.

I said that the pajama ensemble was not wearable any more and had been discarded and thrown away. The government agents told me to bring everything up here, but I forgot a number of things. (The jury is excused at this point, and the following proceedings were had:)

Mr. Kagey: Will your honor permit me to ask a question?

The Court: Yes.

Mr. Kagey: Q. Miss Brandon, did you have a conversation with a gentleman by the name of Kelliher, or some newspaper correspondent, yesterday at your room in the Hotel President?

A. Not yesterday, no, sir.

Q. The day before yesterday?

Mr. Brewster: To this we object. You have already laid the preliminary foundation. You said you would make the offer.

The Court: I understood you would make an offer.

Mr. Kagey: I am asking these particular questions. Let the court overrule the questions, then; the jury will not be prejudiced in any way.

Mr. Brewster: We object to this as improper.

Mr. Kagey: Nobody is hurt in the absence of the jury.

The Court: This has been gone over once.

Mr. Kagey: Yes, but I do not think it has been gone over in the way that we would prefer to have it, and the offer made. You are not going to permit me to ask the questions?

The Court: What is the objection?

Mr. Brewster: I object to this question as incompetent and immaterial, having been already asked and gone over, and answered.

The Court: Sustained.

Mr. Kagey: All right; we will now make an offer of proof. We will make it formally. The defendant offers to proof by the witness now on the stand, Grace L. Brandon, that, on March 29, 1930, she wrote to Rothgerber and Appel, in the Symes Building, Denver, Colorado, a letter in which she stated that she had read their letter to her of March 25, and, in reply, wanted to state that all items referred to in their letter had been worn, and consequently dry-cleaned and pressed two times, and worn several more times; that the pajama ensemble had been worn three times and had a torn place at the top of the trousers, and so forth; all of which appears in the letter marked defendant's Exhibit AA offered by the defendant in evidence, but which the court refused to admit in evidence. I just read enough of the letter to the court, so that it can be identified.

Mr. Brewster: To which we object as incompetent and immaterial, not tending to prove any issue in this case whatsoever.

The Court: Sustained.

Mr. Brewster: Not cross examination.

Mr. Kagey: Very well. We note an exception. The defendant also offers to prove by the witness, Grace Brandon, on the witness stand, that she stated to certain persons in Kansas City, Missouri, either on the 10th or 11th of December, 1930, at her room in the Hotel President, the following: "I do not see how anyone as good, as kind, as sincere and as genteel as Major Shepard was in all his relations with me, could be guilty of the crime with which he is charged." That she also, at that time and place, said, "I just had come home from the field, and they began asking me questions about Major Shepard," meaning the government special agents, concerning whom she testified, "I did not know what it was all about, and, when they had questioned me and I learned that the major loved me and that I loved him, they warned me not to write to him, not to communicate with him in any way, because he was under arrest charged with the
322 murder of his wife. I was not permitted to write to him. I was afraid to write, afraid the agents would

charge me with responsibility in his wife's death because I had told them of his love for me and mine for him.

"I could not speak to him. The government agents still were with me. They had warned me not to talk.

"I am not hard-boiled, please don't think I am a gold digger, I am not a gold digger. I never have accepted expensive presents from any man except Major Shepard, and we were engaged when he gave them to me. I would never accept costly gifts from any man unless I loved him and was engaged to him. He gave me those presents because he loved me. I accepted them because I loved him."

I am trying to separate the wheat from the chaff. She was asked a question there, at that time and place, "If Major Shepard is acquitted, what then?" And she answered, "I am afraid he hates me now; he could not know my reason for not writing, and I am afraid he hates me."

I am trying to separate the wheat from the chaff. She was asked a question there, at that time and place, "If Major Shepard is acquitted, what then?" And she answered, "I am afraid he hates me now: he could not know my reason for not writing, and I am afraid he hates me."

That a government employee, or detective, who was with her at the time, stated to her, when these statements were made. "You do not want to say that, Grace. You cannot say anything now about the future; and do not say anything about that" and then this government detective said to the party with whom she was talking, "Grace does not know what her plans are for the future: she has none."

That she was then asked some other questions, and the detective intervened and told her not to answer. That she was then asked by this gentleman, whose name, I believe, was Kelliher. "And you, Miss Brandon, you say you loved him; but I read one of Major Shepard's letters to you today in which he gave the impression you were keeping your engagement to him a secret from your parents. Is that true?" That Miss Brandon nodded, and said, "My folks did not know, they did not know I loved him, that we were engaged. Mother had broken off my engagement with another man."

That she was then asked: "Then, there has been another man in your life? Is that why you and Major Shepard quarreled before his arrest?" to which she answered, "No, we did not quarrel over any other man. It was another

matter, nothing much, and we settled that. The other boy to whom I was engaged—the affair Mother broke up—that was just kid stuff. One of the boys I was reared with in Midland, Texas. That was not real love, just a kid affair."

That she then told this party, "Please tell the readers of the Journal-Post that I am not hard-boiled, not flippant, not indifferent. I am only here because they made me come. I could not write, they told me—"

We offer to show this witness made these statements within the last forty-eight hours, in Kansas City, Missouri.

Mr. Brewster: To all of which, and each and every part of it, the government objects as incompetent and immaterial, and not tending to prove any issue in the case, and not tending to dispute the witness in any way, or impeach her credibility, and not cross examination.

The Court: Sustained.

Mr. Class: I do not know whether your honor wants to hear from me, but I respectfully—

The Court: I will regard that as a fact.

323 Mr. Brewster: I take it, the court will assume the statement in reference to Mr. Kagey being a great lawyer was correct.

Mr. Kagey: I was not in the case; Judge Class is entitled to that distinction.

Mr. Class: However that may be, I want to take up with your honor the fact that I am very sincerely presenting this matter, and these questions are eminently proper, that anything that goes to the interest of the witness, or the demeanor of the witness, or anything—or any conversations she had with anyone connected with the prosecution, were made to intimidate and cow her. I do not know whether your honor is familiar with the situation about which you refused to permit me to inquire, and for which I have given additional offer of proof.

In Topeka, at all times, whenever anything in connection with this case was on tap, this witness was guarded day and night, and is not, in fact, a free agent at this time. I saw, under those circumstances, we have a right to inquire—

The Court: Do you think the fact that she declined to talk to you has a tendency to prove some issue in this case?

Mr. Class: Not that fact alone, standing alone, but the circumstances of it, may it please the court. I say that, had it not been for Mr. Caffrey, or Mr. Glass, or whoever it

was, who had this witness in charge at that time, that she would have conferred with me, which I had a right to do, but that the witness is not a free agent, that her will power has been overpowered, and that she has been forced to come here as a witness for the prosecution against her will.

The Court: I expect the government has a right to compel witnesses to come.

Mr. Kagey: I did not mean it affected her testimony.

Mr. Brewster: In view of the oath administered, I do not imagine it is customary to interview witnesses before a grand jury.

Mr. Kagey: That matter has been settled many years ago. That is why the names are put on the information.

Mr. Class: We have a right to explore the attitude of this witness, your honor.

The Court: Do you mean that you have a right to explore what she told the grand jury?

Mr. Class: Oh, no, we have a right to explore her frame of mind, at this time, even, your honor, of going to the explore her frame of mind, at this time, even, your honor, of going to the extent of saying, "Miss Brandon, do you wish to see this defendant convicted?" We have a right to ask those questions, but we are not obliged to restrict it to this extent. We have a right to show the facts, and her experiences.

The Court: Go ahead and question her. What you offered here, I do not think is proper; if you have something that is proper, you may offer it.

Mr. Class: Do I understand that your honor has ruled?

The Court: It is cross examination. You may test her credibility, if you have questions you want to ask for that purpose. Are there any further questions?

Mr. Kagey: Yes, I want to make one other suggestion on this letter here.

The Court: All right.

Mr. Kagey: Defendant's Exhibit AA. Now, your honor permitted the government to bring these very garments into court, to permit Mr. Brewster to shake them before the jury; and yet he did not even know what they were called.

Mr. Brewster: I have not even touched them.

Mr. Kagey: Whoever did do it.

Mr. Brewster: My wife is here today, and—

Mr. Kagey: The very articles referred to in this letter,

offered to the jury, sets them out, and calls them—she testified about them, and they were shown to the jury. Here is a statment made by her about these articles, and how she feels about them, and how she feels about the major, on March 29, 1930, and she admits she sent this letter. If this letter is not competent, then I do not believe this witness could be examined by the defendant, and yet I say that
324 is a metter of law. Mr. Brewster thinks it would be.

The Court: I have looked over that letter very hurriedly.

Mr. Brewster: Let me read this letter. This is Rothgerber and Appel; they are evidently writing about selling the goods, or are second-hand dealers—

The Witness: They are attorneys, I think.

Mr. Brewster: Attorneys?

The Witness: I think so, yes.

Brewster starts reading letter heretofore admitted in evidence as defendant's Exhibit AA.

The Court: What issue in this case does that tend to show?

Mr. Kagey: Judge, I take it from your ruling on this, you do not want us to cross-examine this witness about these articles. If you do not want us to, we will save the record.

Mr. Brewster: Let me read further.

The Court: Yes.

Brewster continues and reads the rest of the letter.

The Witness: That was written to impress those lawyers that I did not intend to pay that account.

Mr. Class: The witness says to this man, not "my sweetheart," or "darling," but "this man;" that he is on the payroll until he is convicted; that is what she says.

Mr. Brewster: Her evidence will not convict him.

Mr. Class: I have not any fear of that, but it shows this witness's demeanor, and we have a right to show it, the demeanor and attitude of this witness toward the defendant, because they have produced her, and asked this jury to believe her. Anything that throws light upon the feeling, bias, prejudice or interest of the witness, is receivable in evidence.

The Court: I do not know, there are one or two sentences in here, that might throw some light on the subject. Whether we ought to admit the whole letter for that, of course, I am in doubt.

Mr. Brewster: Do you have the letter the lawyers wrote you?

Mr. Class: Yes, I have it here.

The Witness: Oh, that they wrote me—I do not have the letter, no; I destroyed it; but they wrote me and intimated it was my account, and it was overdue, and why had I not paid it? I wanted to impress on them I was not going to pay it, and they could not make me pay it. It was none of their business how I felt about it, anyway.

. . . . . .

The Witness: Do you not think that is a good form of business letter from a strange firm of lawyers?

Brewster withdraws further objection to correspondence, but says it is encumbering record.

The Witness: As a matter of fact, Mr. Class, my brother dictated that letter for me, and told me I would be crazy to pay it.

Mr. Class: Q. Did you sign it, or did your brother sign it?

A. Yes, sir, and I typed it.

Mr. Class: In addition to the offer made by Mr. Kagey, the defendant offers to prove, at all times since the institution of this prosecution, that this witness, Grace L. Brandon, has been in custody and control on important occasions of the government agents acting as guards for her.

The Court: I guess you can offer anything of that kind, upon which you want to prove. Are you going to prove it by her?

Mr. Class: I thought your honor would refuse to permit us to inquire.

The Court: You may ask the question later.

Mr. Brewster: If they ask her that, and she denies it, and then there is some article in which she says she did, that would be competent.

Mr. Kagey: Let us now see what shape the record is
325 in, after all the remarks of all the counsel. Does the court permit us, at this time, to save an exception to all adverse rulings of the court in this matter? We have all been talking at once, and I do not know whether the reporter got the exceptions or not.

The Court: The government has withdrawn its objection to the letter, and, if it were introduced, that disposes of that.

Mr. Kagey: I think there was an adverse ruling, not about what was in the paper, but what I asked her about, the statement she had made to another party, and the court,

as I understand it, sustained an objection to that entire offer of proof.

The Court: Yes, reoffering what was in the paper, practically.

Mr. Kagey: Yes, but I did not offer it as a newspaper. Now, Mr. Reporter, will you note an exception to the ruling of the offer of proof that I made? The paper is not evidence. That is my idea of it, and that is why I offered it in that way.

The Court: There is nothing further. We can recall the jury, can we not?

Mr. Kagey: Do you want me to ask a question in the absence of the jury?

Mr. Brewster: Go ahead.

I was accompanied to Topeka when the Grand Jury met in April by two detectives. They provided quarters for me and made arrangements for me, at my request. I was accompanied at all times while I was in Topeka by one or more of the agents until I returned to San Antonio. Since my arrival in Kansas City, they have accompanied me on the streets and back and forth to my hotel practically all the time. In Topeka they told me not to talk about the case at all. They said if I did, that you (Mr. Class) would turn around and try to make a liar out of me. That was impressed upon me several times.

Q. Was there any such conversation as that had when you were about to leave for Kansas City, to attend this trial?

A. No, I do not remember—let me see—I was told not to get in touch with the defense, or any of their friends, or the accused; they were watching me, and asked me every so often if any of you people tried to, and, if you did, they would have known it immediately.

Since that occurrence in Topeka last April, neither you nor Judge Kagey have ever talked with me or any counsel representing defendant ever attempted to interview me.

(Defendant's Exhibit BB marked and received in evidence, and made a part hereof, and read by Mr. Class.)

(Defendant's Exhibit BB is identified as being the letter Grace Brandon received from Rothgerber & Appel, to which the defendant's Exhibit AA is a reply. They say:

> "We represent The Neusteter Co., of this city, which was requested to send to you two dresses during the last month, amounting to $104.95, and there was previ-

ously delivered on the same account one set of pajamas, at $10.95.

326 "It may be that these articles have not been used, and that you would prefer to return them to the company. If so, we will be glad to accept them and give you credit upon the bill. If not, will you kindly advise us what your wishes are with respect thereto, as we feel that probably the matter ought to be taken up at this time and in this manner to avoid any further publicity."

(At this point, the court reporter is permitted to read the examination of Miss Brandon, which was made in the absence of the jury relative to the agents of the Department of Justice accompanying her, etc., at different times and places.)

Redirect Examination.

At the time I appeared in Topeka before the grand jury I had received the letter read in evidence here from the defendant telling me what to testify to before the grand jury, and to deny my engagement to him and to make my relations with him as insignificant as possible. I had turned this letter over to the Department of Justice.

Q. I will ask you, too, Miss Brandon, whether or not, between the time you testified in Topeka before the grand jury and the time you were called as a witness in the case in Kansas City, whether or not there were any government agents accompanying you at any time?

A. They were not accompanying me, but they were watching me, and watching my mail, at all times, because, every time I made a plan to leave town for a weekend, or anything, one of them would call me up, or come down to the office and say, "What are you doing tomorrow?" or the next day, or whenever it was, and if I did not tell them immediately, they would tell me where I was going.

Q. Has the fact you were watched by the government agents affected your testimony, in any way whatsoever?

Mr. Class: Just a moment, may it please the court, we object to that, because the witness may state the facts, and it is for the jury to say whether it has influenced her testimony.

The Court: She may answer the question. That is what she has been asked to state. You may answer, Miss Brandon.

A. No, sir, the only thing, if I wanted to tell a story, I could not have, I would have known—I do not know what

would have happened to me, but something would have.

Mr. Wyman: Q. You knew you were going to tell the truth, and always have told the truth?

A. I have to, yes, sir.

Mr. Class: We object to that as improper, putting words in the mouth of the witness.

Mr. Wyman: Q. I do not know whether I have asked you this question before, Miss Brandon, but, after the major left San Antonio, in July, 1920, did he return to San Antonio, as far as you know, until October of 1929?

Objected to as having been traversed and objection sustained. It is admitted that he did not return at all.

Jane Leader, recalled as a witness on behalf of the
327 government, testified further as follows:

Q. The other day, Miss Leader, I asked you about the statement made by questions and answers to the Department of Justice men by Major Shepard, and you testified you have your shorthand notes, and that you had taken the statement down and have your notes with you. Will you read them to the jury? Are they correct?

A. They are.

Q. You may state the conversation.

Mr. Kagey: The defendant objects to this, for the
328 reason that no proper foundation has been laid, and for the further reason that the statements were obtained under duress, as shown to the court by the defendant in his showing, which was made two or three days ago.

The Court: Just a moment. There is too much restlessness in this courtroom among the spectators. The spectators will have to keep quiet. Go ahead.

Mr. Kagey: And the defendant objects to each and every statement attempted to be related by this witness, or stated by this witness, as to what transpired in the special office of the Department of Justice, with respect to taking Major Shepard from his post of duty at Fitzsimons General Hospital to the Denver post office building, where the examination was conducted.

The Court: You may proceed.

Mr. Kagey: Does your honor overrule the objection?

The Court: Yes, sir.

Mr. Kagey: We note an exception to the ruling of the court.

A. (Reading from shorthand notes) This statement, made by Major Charles A. Shepard, to special agent R. J. Caffrey, in the offices of special agent in charge, S. J. McAfee, 328 Post Office Building, Denver, Colorado, taken in shorthand by Jane Leader and transcribed by Jane Leader.

Questions by Agent Caffrey:

Q. Your name is?

A. Charles A. Shepard.

Q. Just state your official position.

A. Major Medical Corps, United States Army.

Q. Where stationed?

A. Fitzsimons general hospital.

Q. How old are you?

A. 59 in October, 1930.

Q. Have you ever been married?

A. Yes, sir.

Q. When were you married the last time, and who did you marry?

A. I think it was in 1916, she was a divorcee, her name was—I cannot think of her husband's name—McCoskey.

Q. Major, have you been advised relative to your constitutional rights in making this statement?

A. Yes, sir.

Q. Do you understand them?

A. Yes, sir.

Q. And you make this statement freely and voluntarily?

A. Yes, sir.

Q. Why do you make this statement?

A. You are asking me to make this statement—for some investigation.

Q. Do you make it because you want to tell the truth?

A. Yes, sir absolutely.

Q. Can you state and give the dates of any time your wife suffered from serious illness, prior to May 20, 1929?

A. No, she was never—never had any serious illness.

Q. From your close contact with your wife prior to January 1, 1929, and from your knowledge of medicine, can you state the general condition of your wife's health prior to January 1, 1929?

A. Over in the Philippines, she had a severe sick spell, and we had the ambulance at the door to take her to the hospital, and she absolutely refused to go, but that illness

there was due more to the use of alcohol, she got to drinking, and, with the heat there and everything, she just went off.

Q. How long after you arrived in the Philippines did this happen?

A. We arrived in August and this was the next Spring.

Q. How long had your wife been drinking?

A. When I married Mrs. Shepard, I found that she had been addicted to the use of liquor, and very often on our wedding trip I found bottles and all that she had been using, and, of course, it hurt me terribly, and I cautioned her and talked to her, and she would stop for a while and then go back to it again, just as I thought she was absolutely broken, but she would go back to it at times. I suppose I would notice it quicker than anyone else, of course, being with her, and it hurt me a lot, and this time in the Philippines, this was excess, because everything was quite free and they could get what they wanted; and I wrote her brothers at the
329 time, and told them of the condition she was in.

Q. Then you state that your wife's sickness in the Philippine Islands, while you were stationed there, between 1922 and 1924, was not due to any tropical disease common to persons who first visit the Philippine Islands from the outside, but that you state that this condition was due primarily and principally to the use of alcoholic liquors and nothing else; is that right?

A. Yes, sir, with the exception of the depressing effect of the climate on women; after they have been there for a time, it makes them nervous.

Q. Do you remember any conversation you had, at the time your wife was ill in the Philippines, with Major G. H. Callender of the Medical Corps?

A. I do not remember.

Q. Did your wife, Mrs. Zenana Shepard, have a tropical disease known as sprue?

A. It was suspected, but never to my knowledge any positive claim was ever made.

Q. Do you know whether or not, at any time, your wife ever suffered from the tropical disease known as sprue?

A. No, sir.

Q. After you left the Philippine Islands, you were transferred to Fort Omaha, at Omaha, Nebraska, and, in August, 1928, you were transferred and reported for duty at Fort Riley, Kansas, in August, 1928?

A. Yes, I was only there a few days.

Q. How long were you stationed at Fort Riley before proceeding to any other Army post?

A. I think it was about five or six days, maybe a few days longer, but a very short time.

Q. After you left the post at Fort Riley, where did you go?

A. To Brooks Field.

Q. Did you report for duty there?

A. Yes, sir.

Q. Where did you live?

A. In San Antonio, Texas.

Q. What was your street address in San Antonio, Texas?

A. 2604 South Presa Street.

Q. How long were you stationed at Brooks Field, San Antonio, Texas?

A. I was there until the graduation, about the 5th or 6th of December.

Q. After you left San Antonio, Texas, about the 5th or 6th of December, where did you go?

A. Back to Fort Riley.

Q. Did you take your wife, Mrs. Zenana Shepard, with you while you were at Brooks Field, San Antonio, Texas?

A. No, sir, she did not want to go, she thought, my being in school, she should not be along on account of studying, and we were just moving into new quarters, and she wanted to get the quarters fixed up.

Q. You returned to Fort Riley, Kansas, about December 9, 1928?

A. Somewhere there, I think it took me two days from there—the 8th or 9th—I do not recall just the exact date.

Q. After returning to Fort Riley, Kansas, did you take up your regular duties as—what were you doing there?

A. I was at the hospital for a few days, and then I was hospital attending surgeon.

Q. Now, Major, I am going to ask you these questions: Did you, on any occasion, obtain from the dispensary at Fort Riley, Kansas, any bichlorid of mercury tablets?

A. No, sir, none that I know of.

Q. Did you ever carry any bichlorid of mercury tablets in your emergency kit?

A. I do not recall that I ever had any.

Q. Can you say definitely that you never had any?

A. I am almost positive that I never had any, because I had no occasion for using them.

Q. (By Mr. McAfee) That is a very common poison for an Army surgeon to carry, isn't it?

A. Well, you see, I only carried supplies for emergency, because we could write a prescription, and they could go to the dispensary and get what they wanted. I carried asperin, calomel, and the like.

Q. (By Agent Caffrey) Major, please state whether
330 or not you ever drew any bichlorid of mercury tablets, or mercury bichlorid tablets, from the dispensary or from the pharmacist or any one in charge of the division at the hospital at Fort Riley, Kansas, where mercury bichlorid tablets are kept, and who could furnish them to you?

A. No, sir, I never obtained any.

Q. Do you know whether or not your wife, Zenana Shepard, possessed any bichlorid of mercury tablets or mercury in any form?

A. I do not believe so.

Q. Is it your belief that you would have known whether or not she kept mercury bichlorid tablets in your quarters?

A. Well, if they were kept in the usual place where we had a few medicines, the cabinet in the bathroom, otherwise, I would not have seen them; it is possible they might have been there, I would not know anything about them; the few medicines we had were in the cabinet. I do not remember seeing any around the house.

Q. Do you recall a conversation you had with Major Strickler on the evening of Mrs. Zenana Shepard's, your wife's, illness, with reference to the possibility of your wife committing suicide by poisoning herself, and you stated to Major Strickler, in substance, that you were positive that nothing like bichlorid of mercury was kept in your quarters, and that you, as attending physician at the post, had been careful to see that no poison had been kept in your emergency kit?

A. We had some conversation over it, because Mrs. Shepard had been very despondent, and several times had stated that she would, if she did not feel better, take something, and that is why it worried me, and that is why Major Strickler, who was a neurologist,—I had him come in and see her, I called him the first night she was taken ill—well, the way I remember about the conversation we had was on account of Mrs. Shepard's condition, I had been very careful to keep

any poisons away, so she could not get hold of anything, whether I mentioned bichlorid, I do not recall now.

Q. What do you believe caused your wife's death?

A. Well, I have been puzzled; I thought several times that she had taken something, and that was strengthened by a statement that Major St. Peter, of Omaha, made to me when he brought a patient here a month ago, he was asking about Mrs. Shepard, and he said that she told him if she had any more of these spells, she was going to make away with herself. He had never told me that before, he made that statement when he brought a patient here a month or so ago, and that strengthened my belief that Mrs. Shepard had taken something, what it was I had no idea, her symptoms were so peculiar, they varied from day to day, I had four or five different doctors there and they could not make them out. Just before I was taken ill myself, and brought here, Walter Rose, dentist at Walter Reed's, had been attending her teeth, and he and Captain Dye, after the autopsy, had taken a smear of some of the ulcers they found, and examined them and found malignant Vincent's, and they mounted the slides and locked them up, and Captain Rose stated to me just before I left, if there was any trouble, they had those slides locked up, and I asked what the trouble was over, and he said, "You do not know what might happen." They came to me and wanted an autopsy, Major Hawley did, and I asked what was the use, if it would help, all right, but she is gone, and he said they would like to look into the abdomen. Mrs. Shepard was absolutely opposed to hospitals, or operations, in fact, she had several attacks of what we thought was appendicitis, and she would not even let anyone examine her if it could be helped, and she objected to an autopsy, and made me promise, if she was ever taken sick and died, she did not want to be cut up, and, when Major Hawley asked that, I said not.

Q. I hate to stop you, Major, but I asked you what caused your wife's death?

A. Well, personally, I do not know, I saw the death certificate, it read "gastro-enteritis, severe case, undetermined." These slides they stated was malignant Vincent's angina, was the cause of her death; these two officers kept these in the safe.

Q. When did you write her relatives relative to her excessive use of alcoholic liquors?

A. I have written them several times.

Q. Who did you write?

A. I wrote Curtis McCoskey, her brother, and I do
331 not remember whether I wrote Ted, her other brother, or not; I think mostly to Curtis.

Q. Did you ever buy any liquor yourself for her?

A. Yes, I did.

Q. (By Mr. McAfee) How old was your wife?

A. 35 or 36.

Q. (By Agent Caffrey) Was there any liquor in the house on any dates prior to May 20, 1929?

A. Yes, I sent and got some wine, she had been drinking this bootleg stuff, and she had been so sick at different times, vomiting, and she promised me if I would take a drink with her when she took one, that she would only take one when I did, and I thought, if we could get some wine, it would stop this other.

Q. Do you remember where this liquor was kept in your quarters? Was it kept in Mrs. Shepard's room or in your room?

A. There was some in my room on a shelf, then there was some in the basement, we had the wine in a keg, and drew off what we wanted in bottles, and she made beer herself, and she handled it, I did not drink beer.

Q. Do you know whether or not there was any whiskey in your room about May 20, 1929?

A. I do not know just what time there had been whiskey on the shelf.

Q. Can you describe the bottles that this liquor was in, that was kept on the shelf of your quarters at Fort Riley, Kansas.

A. No, sir, I cannot.

Q. Have you any idea, at all, with reference to the bottles?

A. No, sir, I have not, I do not know what bottles they were, whether beer bottles or not.

Q. Do you recall a quart-size green bottle, possibly with a whiskey label on it?

A. No, sir, I do not remember.

Q. Could such a bottle have been there, and you would not recall about it?

A. It might have been, yes.

Q. It was not unusual for you to be in your quarters, of the quarters occupied by you and Mrs. Shepard, at Fort Riley, Kansas, during Mrs. Shepard's absence, when she would be

downtown or attending some social function, or be away from the quarters for a few hours?

A. No, sir.

Q. In other words, it would be possible for you to have possession of this liquor and the bottles which contained the liquor in your quarters during the absence of Mrs. Shepard, and without her knowledge?

A. Well, what do you mean, "possession?"

Q. I mean physically; for instance, you could take the bottle and place it on a table, or take it from a table and place it on a shelf, specifically referring to May 20, 1929; or, if you do not recall what happened on that particular date, will you tell us what happened on the date your wife became ill? Where were you that date, where was she, to your knowledge, where she told you she was going, what time you were at the quarters, what time she was at the quarters, the time she left the quarters and the time she returned, what time she became ill, and the actions that you took upon her becoming ill?

A. During the day, I do not remember where she was during that day, I was, of course, busy at my work, but I think it was along about 4 or 5 o'clock, when I came in, and she said she was going to take the car and drive to Junction City to post a letter, and I said it was pretty late, and she said she would come right back, and, when she came back, she brought some sandwiches and said, "We will just eat these here tonight." We were sitting beside the radio. I was not in the quarters along when she left, but the agent for the wine I was getting for her was there, and he stayed 15 or 20 minutes, and she left just as I was talking to him.

Q. How long would you say that you were in the quarters by yourself while she was gone, on the date she took seriously ill?

A. I should say, about one-half or three-fourths of an hour.

Q. Continue.

A. Well, we ate the sandwiches, and she said they did not taste very well, and she did not eat much, and I was busy writing on the table, and I went into the dining room and sat at the table where the typewriter was, and the first thing I heard was a crash, and I jumped up and she was
332 off the sofa, and she was down beside the door, and she appeared dazed, and I ran over to her and asked her what the trouble was and she said she did not know, she

could not see; and I carried her to the bed and talked to her, and then I called one of the ladies, Mrs. Skow, and she came right down, and I called up the chief nurse and tried to get a nurse from the hospital, but it is against the regulations to have a nurse in the officers' home, and I had her wire or telephone to Topeka for a nurse, and she telephoned back and said a nurse would be there on the midnight train, and I asked Mrs. Skow to stay while I went to Junction City, Kansas, for the nurse, and I went over and brought the nurse out.

Q. Could you describe the condition of your wife when she became ill; a physical description of the condition?

A. Well, she appeared dazed, and did not seem to know just exactly where she was, and when I got her to bed, she tried to pick things out of the air, just kept reaching for things as if she did not know just what she wanted, her talk was rambly and everything I would say, she would say, "Yes, just in a minute," but, by the time the nurse got there, she was quieter and seemed settled.

Q. At that time, what did you think was the cause of this unusual condition of your wife?

A. I thought she got hold of some bad liquor, that is what I told Major Strickler.

Q. What do you mean by bad liquor?

A. Something with wood alcohol, something that would affect her eyes.

Q. Did she take a drink after she returned from Junction City that night, and before you ate your lunch?

A. I could not say, but there was liquor on her breath when I picked her up and put her on the bed.

Q. Did she tell you she had taken a drink?

A. It was just this way; along at noon, when I came home, she had been drinking, and showed the effect of it, and I said, "I thought you promised me you would not do this any more," and she said, "If you will just assure me I will not be like Mother, I will stop it," and I said, "This is not helping you any, doing this," and she said, "I know it will not." In other words, I was trying to coax her to let it alone, we were disagreeing about it, and she worried a great deal about mental trouble, and she said, if I would assure her she would not be like her Mother, she would stop it, that she felt so bad, she knew she was going to be like that. Just a few days previous, she had been to a fortune teller, and she said that she was

going to die, and she had that on her mind, and, just before taking sick, I wrote her brother and said she was not well, and would like for her to come to California for the summer, and said she did not want to leave me, and I said I could stand the heat better than she could, and I had her brother write to her and invite her to go there, and when the letter came she said, "Your plans and Curtis's fit in too good," and she saw right throught it. I thought possibly, if I could get her away from that crowd she was with, some people she had been drinking with, get her with her brothers, she would straighten out.

Q. This little argument that you had the day your wife took ill, about noon, was merely caused by your love for her; she was your wife and you loved her and thought everything of her?

A. We had our arguments, as everyone does, and we talked, and she just asked me if I would assure her that she would not be like her Mother, she would try and straighten up.

Q. It was your love for her, and not through anger?

A. We would not be angry; there were no angry words, at all.

Q. It was your attention to her, your desire for her well-being, that you requested that she go to California for the summer, and there was no other reason for that request?

A. Absolutely none.

Q. You loved your wife, did you not, major? And there was no one else between you and her?

A. Absolutely no one.

Q. And your wife loved you?

333 A. Yes, sir.

Q. She was true to you and you were true to her?

A. Absolutely.

Q. Have you ever had a quarrel with your wife, what you would term violent anger?

A. Yes, we had quarrels, the same as everyone does, but we would make up in a few hours.

Q. But you never had a quarrel that would terminate in her leaving you, or you leaving her?

A. No, sir, just get mad at something said to each other.

Q. Have you ever had a quarrel, where she threatened to leave you?

A. Years ago, not lately, years ago we had a quarrel, it

was over this liquor question, it was years ago; and I told her if she did not stop, I would send her home. That was in the Philippines, I threatened that, because I was afraid of the disgrace, and I told her she would have to go home; and, at another time, I told her, if she did not stop it, I would send her home, but that was not in the last several years, because I kept closer watch on her.

Q. From your contact in your capacity as physician, both for the United States Army and as a private physician, would you say that your home life, comparatively speaking, was a normal home life?

A. Yes, sir.

Q. There was no pending divorce or separation at the time of your wife's death?

A. No, sir.

Q. Did you ever consider divorcing your wife, at any time?

A. No, sir.

Q. Did you ever tell anyone that you planned to divorce your wife, at any time?

A. No, sir.

Q. Did you ever tell anyone that your wife planned to divorce you at any time?

A. No, sir.

Q. As a matter of fact, did your wife plan to divorce you at any time, to your knowledge?

A. Not to my knowledge.

Q. Did you plan to divorce your wife, at any time?

A. No, sir, just when I told her I would have to send her away, at the time of this liquor question, during the time we were at the Philippines, and one time at Omaha. I do not remember.

Q. But there was no question of divorce considered by either you or Mrs. Shepard after you were transferred, and while you were stationed at Fort Riley, Kansas, from August, 1928, until June 15, 1929, when Mrs. Shepard died?

A. No, sir. I know I wrote to her brothers, when I came home, about her drinking, and told them she was too fine a girl to let go, and wanted them to see if we could not stop it.

Q. You were writing to Curtis McCoskey?

A. Yes, sir.

Q. Do you remember whether or not you told Curtis McCoskey in your letters to him that you were trying to gradually

wean your wife from the habit of drinking liquor by giving her small quantities of good liquor?

A. I do not recall, I may have written that.

Q. (By Mr. McAfee) Over how long a period did your wife use liquor to excess?

A. Practically ever since we were married. I tried to keep it from everybody. Often she would go several months without taking any, and then, when she took it, she would not want to stop, and I would have to say she was sick with the flu, and things of that kind in order to hide it from people.

Q. You always provided well for your wife, major?

A. Yes, the best I could under my circumstances.

Q. Apparently she was comfortable?

A. Yes, sir.

Q. Did you make any provisions for her in case of your death?

A. $14,000 insurance and accident insurance, besides.

Q. Will you please state the companies in which you have or had these insurance policies, and the date you took the policy out, and the agency through which the policy was issued?

A. I had $10,000 in the Prudential, straight life, that
334 was my war risk insurance turned over—the Prudential took it over, war risk insurance.

Q. Where did you pay your premiums?

A. They were taken out of my salary at Washington.

Q. Do you happen to have a record of the number of that policy at this time?

A. No, sir.

Q. Your wife was beneficiary for that policy?

A. Yes, sir.

Q. Just go on.

A. And $1,000 in the Maccabees, a fraternal organization, taken out in 1898, and I paid the premium in Leon, New York, but that has been cancelled; according to the new insurance laws, fraternal organizations could not give the same rates as we had been paying, and it kept increasing year after year, according to the age, and it got so high and cost so much, I could not keep it up, and they gave $90 for my policy after paying it 28 years.

Q. That is $11,000 and what others?

A. I had $1,000 in the Empire State Life Insurance, and paid the premium in Cherry Creek, New York; and the widows

and orphans fund in the Masons, and paid that in San Francisco, and $1,000 to be paid on the death of a member to the widow; that was an assessment affair.

Q. That is $13,000, and what else?

A. Six months' salary, on my death, paid to my widow.

Q. Since your wife's death, I believe you have had the insurance beneficiaries changed and made payable to your estate?

A. Yes, sir.

Q. You have never had this beneficiary changed to anyone else but your wife?

A. Yes, I had the Maccabees policy changed to my brother-in-law's little girl, she is the beneficiary of the Maccabees; I cancelled it because I could not keep it up. I took out an accident policy and made it payable to her, or to both of his children, in place of this one.

Q. This accident policy was taken out with what company?

A. The Denver Post accident policy.

Q. Do you recall the date your wife, Zenana Shepard, died?

A. It was the 15th of June.

Q. After she died, what did you do—I mean, what disposition was made of her body, and at whose suggestion were the funeral arrangements made, and particularly the part that you played in the burial of Mrs. Zenana Shepard's remains?

A. Her brother and sister were there at the time of her death, that is, her brother, Ted McCoskey, and his wife, Mrs. Ted McCoskey. Mrs. Shepard always said she wanted to be buried in Los Angeles, and we had funeral services there at the fort, and we took the body to Los Angeles. I had wired Curtis, I had a plot where my first wife and baby were buried, and I sent the deed on to Curtis for him to have the grave opened and ready, and we would have the funeral on Friday, and he wired back and wanted to know if I knew she objected to being buried in Englewood, and I wired back and said I did not know, and to hold the remains until we got there, so Curtis met me at the train, and we went to the hotel, and he said she told him she wanted to be cremated, and her Mother wanted to be cremated, and I said I had always been opposed to cremation and I could not think of it, and he said that was her wish, and, as long as it was her wish, we should carry it out, and, after talking a while, I said if she wanted it, and told him she wanted it, all right, but, if she told her Mother, I would not consider it, because

of the breakdown she had, I would question her. I was short of mnoey at the time, and Curtis said he would arrange for the cremation if I consented to it, and so she was cremated, and that was all.

Q. At no time during her life did she ever speak to you about preferring cremation?

A. At different times, she would say she wanted to be cremated, and again, she would say, "I do not know what I want." When we spoke of going to California, she said, "When I go to California, I am going in a box." That was at the time she had been to the fortune teller.

Q. Did Mrs. Shepard have a bad temper, uncon-
335 trollable?

A. No, nothing like that.

Q. She was a fairly easy person to get along with?

A. Yes, just the only thing that caused any unhappiness was her drinking. At one time, I got a maid for her, but she could not get along with Mrs. Shepard, and she thought, with just the two of us, we would be better off.

Q. At the time of her death, you were aware of the fact that she desired a cremation?

A. As I said, she had stated she did not know what she wanted; the last time we talked about that sort of thing, she said, "I do not know whether I want to be cremated or put in the ground and let the worms get at me;" that was her expression, so I was not positive about what she really did want. I was opposed to cremation until I saw the beautiful place they have there and how it is done.

. . . . . .

Q. Did you prescribe any medicine for her while she was ill?

A. I do not know; I did not prescribe anything that I know of; the doctors would suggest certain things, and Major Hawley and Major Strickler prescribed the medicines given; I may have given her soda or something of that kind, but all of the medicines she had were prescribed by other doctors.

Q. Did you ever give her calomel?

A. No,—well, I will take that back; when first taken sick, she had bilious spells and I got 1/10-grain tablets for her, and I think she took five or six tablets, and then she took a dose of salts, and she said she felt better after having a thorough cleaning-out, and every once in a while, she would

say she should have a thorough cleaning out, and would take calomel and then salts, and she had done that for years.

Q. Did she take any calomel the day she became sick?

A. No, she didn't take any calomel after she took sick, the last time, and went to bed; the last calomel she took, to my knowledge, was several days before she became seriously ill, on May 20, 1929.

Q. Did she take any of those Army c. c. pills?

A. Not to my knowledge, during her illness, not to my knowledge, did she take anything, referring to medicines that had a mercury content. After she was sick, she complained of the mouth-wash the dentist was giving her; it was a bichlorid solution and she said it nauseated her, and asked him to change it, and he said there was nothing in the world that would relieve her as quickly as that, and he then gave her lavoris, and it made her feel better.

Q. Then, to your knowledge, she never obtained any medicines containing mercury or bichlorid of mercury, or any mercury solution taken internally, and the only solution containing mercury with which you came in contact during your wife's illness was the mouth-wash prepared by Captain Rose?

A. That is all, to my knowledge.

Q. What doctor was in charge of your wife's case while ill, from May 20, 1929, until her death June 15, 1929?

A. Different doctors, Major Strickler, Major Hawley, a captain from Fort Crook, I cannot think of his name (here Agent Caffrey suggested the name DuFrenne), yes, Captain DuFrenne, and Captain Dye was in several times to see her, and we called in a doctor from Junction City, but I do not recall his name; Major Hawley wanted him called in, but Major Hawley and Captain or Major Strickler came regularly.

Q. Did Major Hawley suggest the names of medical men in Kansas City for you to call in for consultation, and did you call them?

A. He said something about calling somebody from the outside, suggested calling in some man, and I do not remember mentioning anybody in particular, but said there was a good man in Junction City, or some good men in Kansas City, and he called this man from Junction City himself.

Q. But you did not follow his suggestion and call any outside physician?

A. No, he asked me if it would be all right to call some

outside man, and I said yes, and he mentioned some good men in Kansas City and a good man in Junction City.

Q. When Mrs. Shepard was to be removed to the station hospital to have these devitalized teeth removed, did she offer any objection?

A. We had an awful time to get her to go; she absolutely refused, and Colonel Grissinger said their hands were
336 tied, and he thought possibly that was the cause of her trouble, and theirs were tied unless she would go to the hospital, and I told him she was opposed to this, and I told her the doctor could not do anything for her unless she would consent to go to the hospital, but she finally consented to go.

Q. Under what arrangements did she consent?

A. Provided she could go right back home when the teeth were pulled.

Q. Did you ever have any conversation with Major Hawley prior to your wife's death, with reference to an autopsy?

A. I do not remember ever having any conversation.

Q. Do you remember the conversation between you and Major Hawley, the contents of which is as follows,—in substance, Major Hawley told you as follows: "Major, Mrs. Shepard is a very sick woman, she is getting no better, and I am afraid she will not last long, I wish I knew what is the matter with her." Did you ever hear him tell you that about three days prior to her death?

A. They did seem to be at a loss to know just exactly what was wrong.

Q. At this time, and to that statement made by Major Hawley, did you answer, "Well, there can not be an autopsy?"

A. I do not recall ever talking about an autopsy until after her death, and he said they wanted to open the abdomen. As I told the colonel and general, when they came over, I had no objection, and he said we cannot sign the death certificate, and I told him they were making me break my promise to her, which I made in the presence of her brother and sister-in-law.

Q. Did you know the result of the autopsy?

A. They just said they found a mass of ulcers, and were just as much in the dark as before, and not until later Major Walter Rose said they found mercury in some of the ulcers, and this is the first I ever knew that they found mercury, and this was the first I knew anything about it, and, as I said,

it is quite a shock to me, because I never was aware of it.

Q. What did you tell Major Strickler to tell your wife's relatives, Mr. and Mrs. Ted McCoskey, when they arrived at her bedside, with reference to her condition?

A. I do not remember what I told them, I was trying to hide this drinking; Ted knew it, but, as to what I told Major Strickler, well, he knew it; I had to tell him because he suspected that night that it was some liquor that bothered her eyes.

Q. Did you tell Major Strickler to tell Mr. and Mrs. Ted McCoskey that your wife had been drinking liquor to excess, and that was the cause of her illness at that time?

A. I do not remember; I may have; I do not recall.

Q. Did you later ask Major Strickler whether or not he conveyed this impression to Mr. and Mrs. Ted McCoskey; and what was his answer?

A. I do not remember whether I did or not; Mrs. McCoskey did not come with Ted, he came on ahead, and she came later.

Q. Did you tell anyone, including the attending physician or nurse, or anyone else, what, in your opinion, was the cause of your wife's illness which resulted in her death, while she was ill and prior to her death?

A. I suspected right along it was on account of bad liquor, and I may have told them that I suspected that right along.

Q. You knew of her drinking no other liquor but what you purchased for her?

A. She would go out with other ladies and drink in the afternoon, and come home drunk.

Q. On this particular afternoon that she was sick, she had not been on a party?

A. I do not know where she was. There was liquor in the house the afternoon that she got sick, the wine I purchased had not arrived, the man was there, and I had ordered this wine for her, and he just took the order, and it had not arrived.

Q. There was other liquor in the house at this time?

A. Yes.

Q. Do you know what kind of liquor that was, or where it came from, or where it was purchased?

A. I know just about where it came from, she got
337 some from Mrs. Gates, who used to be there; they were very friendly, and she bought some from them.

Q. Can you give us the names of any persons, or the ad-

dresses of any places from which your wife obtained liquor, in order that we may check it up?

A. I do not know of any place except that, one day that she got this liquor, and Captain Dye got some, from some bootlegger the other side of Junction City, or some place down there.

Q. Then, the two sources by which Mrs. Shepard obtained her liquor were Mrs. Gates on one occasion, and from Captain Dye?

A. That is all that I know of, but I would find bottles that I would not know anything about, I did not know where they came from.

Q. On your own behalf, Major, you personally had no objection to performing an autopsy on the body of Mrs. Zenana Shepard, your wife?

A. Absolutely none, I told the general and the colonel, they were both there, that I had no objection, but it was making me break my promise.

Q. Have you ever made remarks to any Army officer, Army man or civilian, that would indicate that you believed the action taken by the Army officials at Fort Riley, Kansas, in causing the performance of this autopsy, to be high-handed, or of an autocratic manner?

A. Only the manner in which it was asked me, I did make remarks at the time, when the colonel and the general came in, they said they came to get permission to have an autopsy, and I said I promised Mrs. Shepard she would not be cut up, and the general spoke up and said, "Well, if you do not give your consent, I will have to take official action," and the colonel spoke up and said, "We cannot sign the death certificate, and there is nothing to do but go ahead and perform the autopsy," and Ted's wife said, "It looks to me as if they were suspecting something of you," or words to that effect. I had no objection to an autopsy, it was the manner of saying it, and, if the colonel had just said they could not sign the death certificate, there would not have been any words.

Q. When you took your wife's body to California for burial there, and after you completed your duties there, with reference to that, where did you go and what did you do?

A. I went back to Fort Riley.

Q. And you stayed there?

A. No, I made a trip to San Antonio.

Q. And what did you go to San Antonio for?

A. Just for a change.

Q. Did you ever hear your wife make a statement at any time that she believed she was being poisoned?

A. No, sir.

Q. Did you ever hear your wife make a statement to anyone else to that effect?

A. Not to my knowledge.

Q. Have you ever come in contact, during your practice as a physician, during your lifetime, with a case of metallic poisoning, taken internally, with the special reference to mercury, or mercury bichlorid?

A. I have never seen a case.

Q. Do you believe that you would be familiar enough with this form of poisoning, that is, mercury poisoning, to diagnose a case of mercury poisoning?

A. Well, I have never had any experience, I have never seen a case, I have been in t. b. work all of my time.

Q. Do you recall the name of the nurse who attended your wife during her last illness?

A. Miss Brown.

Q. Do you recall what you told Miss Brown, the nurse, was the trouble with your wife when you met her at the train at Junction City the night she reported for duty to you?

A. No, I do not remember.

Q. Did you tell her that your wife was suffering from a nervous breakdown?

A. I may have, I was trying to keep this condition from everyone, and I may have told her that, but I do not recall the conversation I had with the nurse.

Q. Did Miss Brown ever tell you, that your wife
338 told her, that she believed she was going to die?

A. I do not recall that she told me that.

Q. Did your wife ever tell you that she believed she was going to die?

A. Yes, she told me before she took sick, several times, and when we spoke of going to California, she said she was going in a box.

Q. With particular reference to her illness, did she tell you, while she was ill, that she thought she was going to die?

A. On the morning of the day she died.

Q. What did she say?

A. She said she knew she was not going to get well, and talked to me about what she wanted me to do.

Q. Did you consult the nurse, Miss Brown, with reference to the treatment your wife was receiving, and the medicine administered during her illness between May 20 and her death on June 15, 1929?

A. Yes, lots of times.

Q. Do you know what examination the organs taken from your wife's body were submitted to, and where the examination took place?

A. Major Hawley took them to Omaha, and I understood them to say they were sent to Walter Reed, but I do not know positively.

Q. Major Shepard, I am going to talk plain to you, to tell you that you have been lying to us; what have you to say?

A. I deny it.

Q. You are lying now, and you have lied during the making of this statement.

A. Not to the best of my knowledge, I have not told an untrue word.

Q. The best of your knowledge—major, I do not like to take this attitude, but, when a man comes to me and tells me of the undying love he has for his wife, and that divorce has never been mentioned, when he absolutely promised a poor innocent girl to marry her if he could divorce his wife, and he told that girl that he was going to send his wife to California to get a divorce, and that was prior to his wife's death, and say that is not lying?

A. I never told anybody that sort of thing.

Q. I doubt if you would swear to that?

A. I will say that I did not tell anybody such a thing.

Q. Did you propose marriage to anyone before your wife's death, that is, between January, 1929, and the date your wife died?

A. I did not.

Q. Then, if anyone states that you did, they are lying?

A. Yes, sir.

Q. Then, Miss Grace Brandon, at San Antonio, is a liar?

A. If she says anything like that, yes.

Q. Your wife did not know that you knew her, Miss Grace Brandon?

A. Not that I know of.

Q. And you did not tell her, did you?

A. No, sir.

Q. Why?

A. Why should I? There was nothing between us at that time, nothing but friendship.

Q. What is there between you and Miss Grace Brandon now?

A. We are engaged to be married.

Q. And you went to San Antonio, after you returned from burying your wife, to see Miss Grace Brandon?

A. Not especially to see her—I did see her then.

Q. At that time, you asked her to marry you secretly, and she refused to?

A. I did not.

Q. And if she said you did ask her that, then she is a liar?

A. I did not say anything of the kind.

Q. Did you correspond with Miss Brandon?

A. Yes.

Q. How did you receive your mail?

A. Some came to the hospital, and some to Junction City.

Q. Where?

A. At the postoffice.

Q. Where, in a postoffice box?

A. Yes.

Q. Did you rent a box there?

A. Yes.

Q. Did your wife know you had that box rented?

339 A. No.

Q. Why didn't you tell her?—tell her that you had this box and was receiving daily letters from this girl?

A. I was not receiving daily letters, other mail from different places came to that box.

Q. From where?

A. From Chicago.

Q. Have you any girls in Chicago?

A. I haven't any girls any place.

Q. You told me Miss Brandon was engaged to be married to you; when?

A. We were engaged to be married in October of 1929.

Q. How long have you known Miss Brandon?

A. I met Miss Brandon when I was down there taking the course, at Brooks Field, taking the course in flying school, that was in October and November of 1928.

Q. You asked Miss Brandon, before your wife died, if you divorced your wife, would she marry you, and Miss Brandon

told you she could not marry you if you divorced your wife, because it was against her religion; is that true, or is it false?

A. It is false; I did not say anything of the kind.

Q. You were writing, nearly almost daily, to her, Miss Brandon, during the time of your wife's illness—you wrote her that your wife got hold of some poisoned liquor, and you did not expect her to live—is that right or wrong?

A. I do not remember whether I told her that or not.

Q. If it is in the letters, and we prove your handwriting, major, your memory will be better. What have you given Miss Brandon in the way of presents, and when did you give them to her?

A. Why do you ask that question?

Q. Because I want to know.

A. Well, I decline to answer.

Q. Have you transferred any insurance to Miss Brandon?

A. No, my insurance is made to my estate, except one accident policy.

Q. Did you ever tell Miss Brandon that you transferred, or was going to transfer, any insurance to her as beneficiary?

A. Yes.

Q. You will not tell me what presents you have given her—well, I will tell you: You gave her the Buick coupe she is driving, you purchased it for her, and she has it. She has two diamond rings you bought for her; each Sunday, she gets a bouquet or potted plants or flowers of some kind; each Saturday she gets a telegram—

A. No, sir, she does not.

Q. Did you ever make a will?

A. Yes, sir.

Q. Tell us the contents of it.

A. I left everything to Miss Brandon.

Q. When did you make this will?

A. I think it was along in November or December; I do not recall the date.

Q. As a matter of fact, it was in September?

A. Well, I do not remember the dates; it was along about that time.

Q. Where is the will now?

A. She has the will.

Q. If it was made in September, you actually knew when you became engaged to Grace Brandon?

A. I gave her the ring along in October sometime.

Q. Do you think that Grace Brandon would sign an affidavit and swear to it falsely?

A. No, I do not think she would.

Q. Do you believe that Grace Brandon is truthful?

A. I have always thought so.

Q. You have no reason to believe that Grace Brandon would lie?

A. No, I have not.

Q. You have no reason to believe that Grace Brandon would lie?

A. No, I have not.

Q. You have no reason to believe that Grace Brandon would tell an untruth about you?

A. No, I have not.

Q. If Grace Brandon made a statement, you would
340 believe it as true, would you not?

A. Yes, sir, I would.

Q. (By Mr. McAfee) It is the same old story, major; a woman has turned you in?

A. Well, I don't know anything about that.

Q. You lost your head over this fool girl?

A. No, sir, I did not lose my head over her. My wife made me promise that I would marry again.

Q. (By Agent Caffrey) Why were you trying to get this girl to consent to marry you before your wife died, wanting her to marry you if you got a divorce?

A. That is absolutely wrong.

Q. You were going with her, you went with her every night?

A. No, sir.

Q. While in San Antonio?

A. No, sir.

Q. Did you borrow any money while in San Antonio?

A. Not at that time.

Q. You borrowed no money while in San Antonio from anyone?

A. No, sir.

Q. You did not owe any debts when at the school, did you?

A. I owed bills at the post exchange, a few little things of that kind.

Q. Do you think that your wife was truthful?

A. Yes, sir.

Q. Then, if she wrote a letter to her brother, Theodore McCoskey, the same time you were writing letters to Curtis McCoskey, and she told Theodore McCoskey that you were wrongfully accusing her of over-drinking, then you would say that she was telling an untruth?

A. No, sir, she was not telling the truth then; the boys saw it themselves when she was at home.

Q. Why do not you tell the truth?

A. I am telling the truth, just as I know it. I met this party down there, and there was nothing between us but friendship, until after Mrs. Shepard passed away.

Q. When you wanted to send a wire to her, why did you tell the man who took the wire that you were sending it to your niece?

A. I do not remember telling any such thing.

Q. Did you send this wire to her about the latter part of July, 1929: "Had to go to the hospital, will be unable to write for a few days stop. Send mail direct to hospital Fort Riley. Do not worry for I will be all right. Will wire if case becomes serious stop. Love, Charlie."

A. Yes, I may have sent that, probably did; that was the time I was taken to the hospital myself.

Q. As a matter of fact, you could not divorce your wife?

A. I never thought about it.

Q. You had no grounds for it?

A. No, sir, I never thought of it.

Q. Now, major, I do not intend to get personal when I make this statement: your income was not sufficient to support two women?

A. I did not try to support two women at one time.

Q. But, in case you divorced Mrs. Shepard, you would have undoutedly been forced to contribute to her support?

A. Yes, if I had any thoughts of divorcing her, but I did not.

Q. Just one little thing: that little girl's religion, that was taught to her at her Mother's knee, when she was a child, is the only reason that your wife is dead today?

A. No, sir.

Q. And you would tell us that, if you told the truth?

A. I am telling you the truth, absolutely telling you the truth.

Q. She could not marry you, because her religion would not let her?

A. I do not know anything about that.
Q. What religion is Miss Brandon?
A. I do not know.
Q. You do not know the religion of the girl you are going to marry?
A. I know she is not a Catholic; I know she has attended the St. Mark's Episcopal Church.
Q. (By Mr. McAfee) Major, you will have to con-
341 front this woman.
A. All right.
Q. (By Agent Caffrey) What did you pay for the diamond ring you gave her?
A. I had the diamond ring, and I just had it remounted.
Q. Did your wife ever wear it?
A. Yes, she pawned it and I got it out. She was wearing two fictitious rings, and, when I took them to the jeweler, I found they were no good, and that she had pawned her rings.
Q. What is the value of these rings that you gave Miss Brandon?
A. The stone in one is worth $400, and the other one we got at Christmas for $100.
Q. What is the value of the car?
A. The car cost $1500, and I turned my car in on it, and they allowed me about $1000 on it.
Q. And you gave all of these things to Miss Brandon, three months after your wife died?
A. No, sir.
Q. It was just three months after she died?
A. It was along in October, I gave her the ring in October, but the car was not turned over to her until November, I left the car down there in October.
Q. You brought the car back in July and left it there in October, 1929?
A. Yes, sir.
Q. How did you come to meet Miss Brandon?
A. I met her at the place where I was rooming at San Antonio.
Q. How long have you known her?
A. When I was there at school in 1928.
Q. How soon did you start to correspond with her after you met her?
A. I don't remember the exact date.
Q. About when?

A. Sometime along in the following winter or spring.

Q. (By Mr. McAfee) In addition to that, you make a will and leave her all of your property?

A. I have no one else to live for, or leave it to; I have brothers and sisters, but they are all taken care of.

Q. You must have thought a lot of that girl?

A. (No reply.)

Mr. Brewster: That is all.

Cross examination: I transcribed these notes, but was not present when Major Shepard refused to sign them on account of inaccuracies. I made eight transcriptions of these notes and gave them all to Mr. Caffrey. I do not know where they are now. I kept one copy.

Martin DuFrenne, recalled as a witness on behalf of
342 the government having been previously sworn and examined, testified as follows:

I had a conversation with Major Shepard the day of the funeral as to how his wife took sick.

Q. Tell the jury what it was.

A. Major Shepard called me to his quarters the day of the funeral, and he told me that Mrs. Shepard had been downtown the day of her illness, and, when she came home, she looked very tired, and he said, in substance, like this: he said "Dear, you certainly are tired, are you not?" and he said, "Would you not like a ginger ale highball?" I do not know what Mrs. Shepard said, but anyway, Major Shepard said, he fixed her a drink at that time.

No cross examination.

Kathryn McCoskey was recalled as a witness on be-
343 half of the government, and testified further as follows:

When I arrived at Junction City, I had a conversation with Major Shepard about how Mrs. Shepard took sick.

A. (Continuing) He told me that, the day of her illness, on the 20th, she came back from Junction City, she was very tired, and he asked her if she would like a highball, and she said she would, and he fixed her a drink, and she lay down on the couch, and he went in the other room, and heard a crash, and he came in, and she was picking things out of the air, and she was delirious.

(Government's Exhibit 26 admitted to be in the handwriting of Major Shepard and offered in evidence and read to the jury. It is as follows:)

"Sunday, April 15/30.

"Dear Curtis & Betty: Some time ago I asked Major Denison to write you regarding a large cedar chest containing silver & linen, stored for safekeeping with Major Strickler when my furniture was crated & sent here. The chest contains all the flat silver & plate, all the china & other linen, all Zenana's pieces of cut work & other fancy pieces. There is a box containing 1 dozen silver spiders from China, used to hold place cards. Betty can use her own discretion as to what she wants herself, and divide as she wishes with Kitty. There is only one thing there that I would like to have you return to me, a knitted bedspread & cover for bolster or pillow. I want something of Zenana's to keep, and that she used on her bed. You may send it to me express or parcel post as I will never have a home again. The other things might as well be in use. As you know, I was arrested March 17, charged with a crime, which, as God is my judge, I am entirely innocent of. If Zenana could speak, she would tell you the same, for I never harmed a hair of Zenana's head. I loved and protected & shielded her—tried to keep her habit from the rest of the world, as you know I have talked to you many times about it. I gave my own blood that morning in an effort to save her life, and Kitty wouldn't allow her own brother to give it. No Curtis, there was no motive, nor was there any crime. I am the victim of personal animus on the part of two Army officers—the same two who tried to get me on an 'unfavorable entry' on my efficiency report in July, and failing in this, they reported 'mysterious death' and circumstantial evidence, which caused the investigation. I welcome it, for my conscience is clear, and with right, justice & God on my side there can be but one outcome, complete vindication! As you once wrote me, referring to the money she had borrowed for her rings, 'no matter what she had done, we both loved her.'

"She had told me many times that if anything ever happened to her, she wanted me to marry again within a year: said she would do the same if I was taken; that it would be no disrespect to her; that I had always had and loved my home; had never been accustomed to running around, and she wanted me to always have one. She repeated this a few

hours before she died, when she told me about the jet ring & necklace for mother. After my sickness which caused my transfer to Denver, I was very lonely, thought I wanted a home again. I became engaged to Miss Brandon in Sept., gave her a ring in Oct., and was to have been married next August, 15 months after Zenana's death. However, that is all over now, I could never ask anyone to share my name with this stigma on it, even though I am innocent and know I shall be cleared. My brothers are trying to raise $10,000 for my defense, but it is hard work, as they are both
344 on a salary & George lost all his savings, $17,000, in the stock crash last November. So I will be repaying them for years to come. I am sorry I have been so neglectful in not repaying you for the money advanced me in June. It was just carelessness & that's all. My salary is withheld from me, while I am in the hands of the civilian authorities, so Major Denison had to sell two Chinese rugs for me, to pay my messbill, and for my meals being sent in here, as I cannot eat the prison food on account of my stomach trouble.

"Now, regarding the will, I made a will leaving everything—the little I had in life insurance, to Miss Brandon, with the exception of one accident policy & one life-insurance policy in the Maccabbees for $1000, which was left to your two little ones. About March 1, three weeks prior to my arrest, before I had any knowledge that I was under suspicion, I made a new will, leaving my personal property to Ivan & Mrs. Wallin, my brother's daughter, living here in Denver, and the balance of the insurance to my brothers & sisters in Toronto, Canada. This can be attested to by Judge Class, my attorney, who has the will now in his possession, and of which Major Denison is one of the executors.

"Bail was fixed at $25,000, later reduced to $17,500, but as surety companies require negotiable securities for the full amount, it has been hard to raise, as Army officers have only their salary. They are all standing nobly by as well as the Masons, who secured a well-known attorney for me. I have received many wonderful letters from California to Montreal, Canada, all expressing confidence in my innocence, which has all helped to keep up my morale. But it is the shame—humiliation and sting of the confinement—4 weeks tomorrow—that is so hard to bear. It is a terrible punishment for being innocent. God's inscrutable ways are hard to understand.

"The grand jury meets in Topeka tomorrow, and as only the government side is ever heard before them, an indictment will be returned—as a probable cause for a trial. Then there will be a preliminary hearing here on Wednesday, and date of trial set later in Topeka. Suppose the agents of the Department of Justice have interviewed you also, as they have everyone else. They knew about the first will as they mentioned it to me. I had intended sending the copy to Miss B. but evidently sent it to you by mistake, when sending the accident policy; otherwise dont know what became of it. But as I have mentioned, that has all been changed, and is now a thing of the past. As you all stopped writing to me about that time, supposed you had received.

"I am enclosing a copy of two letters, which I will ask you to return to me.

"I will close by adding that your confidence in me is warranted as much now as at any time you have known me, as I am entirely innocent of any wrongdoing, and know our Heavenly Father will clear the way for me to prove it.

Sincerely,

CHARLIE."

I was present the day my sister-in-law died. As to being able to talk in the morning, she could not, she was too sick. When the transfusion occurred she came out of that condition for just a few minutes. I was there all that time; then she went to sleep. At that time she had no conversation with Major Shepard about getting married to my knowledge. I was there.

Recross Examination.

After the transfusion we all stood in the doorway
345 and she told everyone to leave the room she wanted to go to sleep; that was the last thing she spoke to my knowledge; that was immediately after the transfusion.

Clara Brown, recalled as a witness on behalf of the government, having been previously sworn and examined, testified as follows:

On the morning of the death of Zenana Shepard her condition was that she seemed very sick. She did not answer questions or try to. I tried to give her ice but she could hardly take it. She was not able to carry on any conversa-

tion with me. Right after the transfusion was had Major Shepard told me to go over to the nurses quarters and rest. I told him that I would rather stay there, I did not care to rest. He told me to go on over. I was there when she died. Mrs. McCoskey sent for me by telephone.

Recross Examination.

I did not spend every afternoon in the nurses quarters. Part of the time I had afternoon golf. I did not say how many afternoons I spent at the nurses quarters.

C. R. Glenn, called as a witness on behalf of the government, having been first duly sworn, testified as follows:

My name is C. R. Glenn, I am a Major Medical Corps, stationed at Langley Field, Virginia. In November 1928 I was at Brooks Field Texas. I knew Major Shepard there and roomed with him. The only time to my personal knowledge, I knew of his going out with one Grace Brandon is the time he took my car and went to the border. I was away at the time. I found the mileage on the car, and then we talked it over and he told me about it. He said he had driven down to the border with Miss Brandon, Dr. Sayre and some French lady. I am acquainted with the flying fields in the United States and their location.

Witness here names about 20 or 25 flying fields of the United States Army, some being Bowling Field, Washington,
D. C.; Boston, Mass.; Mitchell Field in New York;
346 Langley Field, Virginia; Fort Riley in Kansas; Fort
Leavenworth in Kansas; Wright Field, Dayton, Ohio; Rockwell Field, California; Mather Field, at Sacramento.

Cross Examination.

I was sent to San Antonio to take the Flight Surgeon's training course. After Major Shepard left in December 1928, I was assigned to Fort Sam Houston, to the Second Ambulance Company, that was not in the Air Corps at that time. I remained in San Antonio after Major Shepard left because I was ordered to and I had no choice. It was in February 1929 I received an assignment to the Flight Surgeon's Service.

Brooks Field is not the largest of all the fields I have mentioned and it is not one of the largest in the world. General Ireland did not say that the Army Flying Field at San Antonio was the largest in the world.

Q. There are a good many down there, are there not, a good many flyers stationed there at San Antonio, or Fort Sam Houston?

A. May I qualify that answer?

Q. Just answer that question: There is more than one, is there?

The Witness: May I explain the answer?

The Court: Certainly.

A. Brooks Field is a training field for primary pilots.

Mr. Class: Q. Yes, sir.

A. It is comparatively a small field. San Antonio, in the district of San Antonio, there are a number of fields: There is Brooks Field, there is Dodd Field, and there is Kelly field; and they are building one of the biggest fields in the world, Randolph Field, at which there are, at present, no troops; no flying done from there, as yet. All of these fields will be combined later into this one big field. That was General Ireland's statement.

Q. Very well; I was not particular about how they were divided; I said San Antonio.

A. San Antonio is the flying center.

Q. I am talking about San Antonio itself, and the environment there.

A. Yes, sir, San Antonio.

Part of the duties of the flight surgeon is to examine
347 the young men who want to be pilots when they go up and when they come down and treat them properly.

Q. Is it not a fact, major, that, if a member of the Medical Corps is stationed at Fort Sam Houston, or at or near Brooks Field, or Dodd Field, or any of these others in that immediate vicinity, he stands a much better chance or opportunity to be assigned to the Flying Corps, if he is there on the ground, than if he would be transferred from some other distant station?

A. May I qualify that?

Q. Oh, yes, go ahead.

A. A man stationed at Brooks field, Kelly Field, or Dodd Field, would be already in the Air Corps; a man who was in the vicinity, and had graduated from the flight surgeons' school, all other things being equal, he, having equal qualifications, and not being required some other place, he would be assigned to that duty.

I know Major Gore. He was also a member of the same

class with me and Major Shepard. He was stationed there at San Antonio and received an assignment to the Air Corps in addition to his other duties.

Q. And you members of the Medical Corps considered the assignment to the Air Corps very desirable?

A. Some of us do, and some of them do not.

Q. You rather like to take that 50 per cent increase in pay, do you not?

A. Yes, sir.

Mr. Class: That is all.

Mr. Brewster: The government rests.

At this point the government rests, and the following proceedings were had:

Mr. Kagey: At the conclusion of the government's evidence, the defendant files and presents a written motion, to direct a verdict of not guilty, for the reason that the evidence failed to prove the defendant guilty to the degree of certainty required by law.

(Argument on above motion.)

Mr. Kagey: The court, upon consideration, overruled the motion, to which ruling the defendant duly excepted.

DEFENDANT'S EVIDENCE.

Thereupon the defendant introduced the following
348 evidence:

Mrs. Zenana Curtis was called as a witness on behalf of the defendant, and testified as follows:

I am 86 years old and at the present time am living in Los Angeles. I am the grandmother of Mrs. Zenana Shepard. I knew Mrs. Shepard all of her life. Before her marriage to Major Shepard, she lived at my house. In fact, she lived there more than once. She was less than twenty the first time she lived with me. She was not more than twenty-two or twenty-three the second time she lived there. At that time she lived with me for about a year. She never lived with her first husband after he left her. She lived with me about a year, more or less, before she married Major Shepard. She married Major Shepard in 1915.

Q. I mean the second she lived with you—she was married

to Major Shepard in 1916. Can you tell us what year it was she lived with you the second time?

A. I cannot tell you the exact year. The second time she lived with me was when her first husband was a convict in San Quentin.

Q. She got a divorce, did she?

A. Yes, at my expense.

Q. Mrs. Curtis, did you know, or did you notice her habits as to using intoxicating liquors during the second time that she lived at your home?

Mr. Wyman: Just a minute now, just a minute—just a minute here, Mrs. Curtis—

Mr. Kagey: She does not understand—

Mr. Wyman: Yes. The Government desires to object to that question as being incompetent, irrelevant and immaterial, and far too remote.

Mr. Kagey: We will follow it right up with testimony all the way down the line. We have got to commence somewhere.

The Court: Very well, go ahead.

Mr. Wyman: Exception.

Q. You may tell the jury what that habit was, what you noticed about that?

A. Her habit was just a replica of what her father had been. I could tell when she was under the influence of liquor, she did not have her graceful, swinging stride. She stepped with a great deal of precision. There was a slight drawing of the eyes, but she never showed it in her voice or in any other manner. If anything, she was more reticent then than at any other time.

She was always well behaved. I judged the amount of liquor she consumed by the number of flasks she hid in my cellar. They were quite numerous, but I never bothered to count them.

Q. Did she ever become violent?

A. On a few occasions she was about what you would term riotous, that is, she dropped her reserve. Usually an ordinary person would not notice it.

Her mother was there only part of the time. Her
349 mother was fully aware of the things and she became insane and was sent to Patten Insane Asylum.

Q. Yes, over her daughter.

Q. Did she have some trouble about that time, that is

about the time her mother was sent away, was there some trouble?

A. This same trouble, her mother was conscious of it all the time.

Q. Was there ever an occasion when she has to be locked up?

A. We locked her once anyway.

Q. One night?

A. Yes.

Q. How long was that before her mother was taken to the asylum?

A. Not very long, that was the final crash.

I knew of her marrying Major Shepard sometime after that. I visited her and Major Shepard at Needles. That was during the World War and shortly before he went into the service. I was there a couple of months, not quite.

Q. Did you notice anything about her using intoxicating liquor at the time you visited her and Major Shepard at Needles?

A. Why, yes, because I could tell always, Yes, I was familiar I could always tell when she was under the influence of liquor.

Q. How much of the time was she under the influence of liquor?

A. Only a part of the time.

She did not drink continually. While at Needles I frequently took walks in the morning because they kept house and she would say, "Oh, go take a walk now, I am busy." Sometimes when I would return, I would be able to smell liquor on her breath.

Q. Did you notice any difference in her appearance?

A. The same old thing, the precision of her walk and not talk very much.

Q. Did you know the kind of liquor she drank, both when she was at your home after she left her first husband and while you were visiting them at Needles?

A. Oh, I would call it hard liquor.

Q. Hard liquor?

A. Distilled liquor.

Q. Distilled liquor?

A. Yes.

I always corresponded with her. I got letters from her

during the time that Major Sheaprd was in San Antonio, more frequently than usual. This was when she was alone at Ft. Riley. I do not have the letters now, I destroyed them. Q. Why did you destroy them? A. Because when I broke up housekeeping I applied that rule generally to my correspondence and her's particularly. I knew her handwriting at the time. I do not know whether I could distinguish it from others now or not. I remember receiving letters from her while Major Shepard was at San Antonio in the fall of 1928 in
350 which she said something about drinking.

Q. What did she say?

Mr. Wyman: Just a moment, your Honor—

A. She said—

Mr. Wyman: I want to object to this as being incompetent, irrelevant and immaterial and hearsay.

The Court: I did not get that.

Mr. Kagey: She said she received some letters from Mrs. Shepard while Major Shepard was in San Antonio in which she spoke of drinking, and I asked her what had become of the letters and she said she had destroyed them because she had broken up housekeeping, and I asked her what she said about that subject in those letters, if she can remember.

The Court: Go ahead.

I had only become her confidential friend. Among other things she said that she felt the absence of the restraining influence of Dr. Shepard—and that he was willing that she should drink wine, but "that don't satisfy me; I have got to have hard liquor," and in one letter she said, "and this bootleg stuff that I get, it makes me sick."

Q. Did she say anything about wanting to live or not wanting to live?

A. In one letter—

Mr. Wyman: The same objection heretofore stated.

A. There were frequent letters—.

Mr. Kagey: If the court will rule quickly I will not have to stop this witness because it is difficult to make her understand. I think it is competent beyond any question.

A. She had periods of remorse and in one of her letters she said, "I wish I were dead."—and while that was the most powerful thing she said, frequently she said she was very low spirited, sometimes very low spirited, and she did not want to drink, she could not help it.

Q. You know about that, did you? A. Oh, yes.

Mr. Wyman: Objection to that last statement and ask the jury not to consider it.

Mr. Kagey: It is pretty close to the line.

The Court: Oh, there is a good deal here that ought not to come in, because of the age of the witness—well, go ahead.

During the time that I lived with Major and Mrs. Shepard, or that I had occasion to observe them they got along in the most exemplary way. His manners were good, and so were her's. She idolized her two brothers, Curtis and Theodore McCoskey.

Q. Did she ever say anything in her letters to you
351 about getting a divorce, that you can remember?

A. She was afraid he would get a divorce.

Q. She said that?

A. Yes, she was sincere—"Then what shall I do? she would say to me."

Cross Examination.

I cannot tell the last date I saw Mrs. Shepard before her death, I would say around 4 or 5 years. I never saw her take a drink, but I understood the effects of it, and she did not deny it to me.

Q. But you personally never did see her take a drink?

A. I never saw her put the bottle to her lips in that way.

Q. You stated that the reason you knew she has been drinking was because she walked with precision?

A. Because of what?

Q. Because she walked with precision?

A. Invariably, her manner was entirely different when she was under the influence of liquor and she did not deny the fact to me at all.

Q. But she was always able to walk straight, was she not?

A. It was a perfect replica of her father, and in that respect it took a person very familiar with her to tell it on him and yet he died of it in the county hospital.

Q. But you never saw her when she could not talk coherently at all, did you, Mrs. Curtis?

A. Yes, incoherently, there was not the ordinary connection when she was not under the influence.

She never had the habit the first time she was living with me, it was along when she was living with me the second time. I cannot relate the particular dates or the conversation I had that made me think her conversation was incoherent.

It has been too many years since. In talking with me she would make answers that had no relation to what she had been saying previously. I thought Zenana Shepard was a very fine, lovable lady, charming, and she was very good looking. The last time I visited Mrs. Shepard was 12 years ago at Needles. I never visited her but once. She visited me at different times in Los Angeles. She would come over herself. Curtis and Theodore, I do not know necessarily that they came with her. She did not drive, I think she came on the street car. We were always on good terms.

Q. On any of these visits that she made over there
352 to your house—I am speaking now after the time you visited her at Needles—she never had the appearance of having been under the influence of any alcohol?

A. She did not come to me when she was in that condition at any rate, whatever she may have done in other places.

Q. When she visited you then she was always perfectly sober?

A. You must bear in mind she was not a constant drinker—that was the way with her father, there were years between when he would not take a drink—

During the time she visited with me she did not come
353 when she was under the influence of alcohol.

Q. Then, to your personal knowledge, I mean to your own knowledge, that you know yourself, you have not known of her taking a drink for the last twelve year, have you?

A. Yes, I have her own letters.

Q. That letter you spoke about a moment ago?

A. We corresponded very frequently. It was like this: You know it is human nature to need a confidant and I was her confidant always. She told me freely of her struggles to try to resist it but when that desire came on her she could not resist it and then for a time she would indulge herself.

Q. But, to your personal knowledge you never saw her do it?

A. Why I never saw her father drink either.

Q. I am just asking—just a moment—

A. I never saw her put liquor in her mouth.

Redirect Examination.

I know Mr. Caffrey, the government agent, and he called upon me once. He talked with me about Mrs. Shepard's habit of drinking liquor.

The Witness: I can tell exactly what I said to him.

Mr. Kagey: I should like to have you testify but it is not competent. I just wanted to show he did talk with you.

I received some letters through the mail last summer and fall.

(Defendant's Exhibits GG, HH and II identified as being in the same condition they were when she received them through the mail. Offered and received in evidence, being as follows:

"GG

(Envelope)

"Zenana Curtis, Box 661, Hayden, Arizona. Postmark: Denver, Colo. JUL 18 1930 6.30 PM. 1. Notice how neatly this envelope is cut. Z. H. C.

"HH

"Mrs. Curtis Box 661 Hayden, Arizona. Postmark: Denver Colo. JUL 31 1930 6 PM. 1.

"II

"Mrs. Curtis Box 661 Hayden Arizona. Postmark: Denver Colo AUG 14, 1930, 6.30 PM. 1.

"Note. This letter was mailed Aug 14-15 and just reached Hayden Aug. 19th. Seems quite a trip from Denver? C.

"See what my Hayden friend says!

"This came Aug 21, 1930.

"Dear Friend: There is nothing of interest to write, the heat has been very trying and at night I am all in and have not enough 'pep' to write.

Sincerely,

GEO."

Q. Were those envelopes opened when you received them?

A. Yes,—

Q. Had you opened—you started to say something?

A. We had a suspicion—

Mr. Wyman: Just a moment.

354 Mr. Kagey: You cannot tell that.

A. (Continuing) The letters were sent through a friend of mine, that sent about 661, because they had been tampered with—

Q. Yes.

A. And these came enclosed in an envelope from Hayden.

Q. Yes.

A. —by a friend of mine that forwarded them to me.

Q. Had any of your letters you received before that been opened before you got them?

Mr. Wyman: Just a moment here, I want to see the envelopes and find out if you are trying to identify these letters.

Mr. Kagey: I am trying to try my side of the lawsuit, Mr.—

Mr. Wyman: That is what I want to find out, if you are contending the letters were written by anyone, and if so who were they written by.

Mr. Kagey: It is absolutely immaterial as far as this case is concerned what was in these letters, what I am trying to show is—

The Court: You tell me what you are trying to show? Let us not be so mysterious.

Mr. Kagey: Have I not a right—

The Court: You are offering something to this jury. Tell me what you are offering.

Mr. Kagey: Everything I say is in the record. I have to connect them up, Judge.

The Court: Tell me what you are going to connect them up with?

(Conference of Court with counsel.)

Mr. Kagey: We will excuse the witness then unless you want to cross examine her further?

Mr. Wyman: Just a moment, I will see.

Mr. Kagey: I think there is nothing else, but this that I asked her about. I think if you are through we are through.

Mr. Wyman: I believe that is all, your Honor.

The Court: Very well.

Mr. Kagey: That is all.

Mrs. Joseph Frazier was called as a witness on behalf of the defendant, and testified as follows:

I am the wife of Captain Frazier of the United States Army and we live at the present time in Denver, Colorado. I lived with my husband in Omaha from June, 1926, to September, 1928, and was acquainted with Major and Mrs. Shepard for two years. We lived about two houses apart at the post. I had occasion to see Major and Mrs. Shepard frequently. I had a conversation with Mrs. Shepard with respect to her disposition in connection with hospitals.

(The conversation here objected to by Mr. Brewster and after a discussion, the objection was overruled.)

Q. When and where was that, as nearly as you can remember?

A. In the holiday season of 1927, I was at Mrs. Shepard's, at a sewing bee, many of the officers' wives on the post, and some off the post, were there, and, in the course of the conversation, Mrs. Shepard made the remark, she had always told the doctor she never wanted to go to a hospital, never wanted an operation, and never consented to a knife touching her body, and did not even wish to be touched with a knife after she was dead.

Q. Did you have any conversation with Mrs. Shep-
355 ard, either at that time or any other time, with respect to any arrangement which had been made between Mrs. Shepard and Major Shepard, if either one of them should die?

(Objection here made by Mr Brewster and objection overruled.)

A. I heard Mrs. Shepard remark that, if either she or Major Shepard died, that one or the other would be willing to marry again, because she wanted Major Shepard to always have a home, as he was very fond of a home, and he wanted her to do the same thing.

Q. What was Mrs. Shepard's disposition, as far as you know and were able to observe, as to whether or not she was cheerful, melancholy, or otherwise, during the time you knew her?

A. She was a woman of moods; sometimes very cheerful, and again melancholy.

Mr. Class: That is all.

Cross Examination by Mr. Wyman.

Q. Mrs. Frazier, is it not a fact that no one wants to go to a hospital, or be operated upon?

Mr. Class: Just a moment; the witness is not competent to testify to that; that is a matter of argument.

The Court: You may answer, if you know.

Mr. Class: We save an exception as to what any other person might wish.

A. I do not know.

Mr. Wyman: Q. You do not care to be operated upon, or go to a hospital, do you, Mrs. Frazier?

Mr. Class: That is a matter of argument. We object to it, may it please your honor.

The Court: You may answer.

Mr. Class: Save an exception.

A. No, I do not.

Mr. Wyman: Q. And, Mrs. Frazier, is it not a fact that there are times when you get a little moody in your disposition, yourself?

Mr. Class: We object to that, what the disposition of this witness may be.

The Court: Yes, I guess so.

Edward J. Strickler was called as a witness on behalf
356 of the defendant and testified as follows:

I am a Major in the Medical Corps of the United States Army, and specialize in Psychiatry which is a study dealing with mental diseases, disorders of the mind. In addition I am a regular physician and surgeon. I graduated from the University of Kentucky in 1907 and practiced for approximately three years. I spent some time in the state hospital service in New York along my special line, subsequently in Illinois, in the state psychopathic institute, and subsequently in Michigan, the psychopathic institute at Ann Arbor, and entered the United States Army in 1917 and have been there ever since. I was stationed at Fort Riley on October 20, 1928, and was there in May, 1929. I was called in the first night of Mrs. Shepard's illness about 8:00 o'clock in the evening.

Q. Now, go ahead.

A. Mrs. Shepard was lying in bed, fully clothed, and was apparently hearing voices. She continually reached out, as if picking objects out of the air, brushing them off of her bed, and she was blind to the extent that she could not recognize fingers held in such a manner (indicating) before her eyes, and she complained of some numbness in her lower extremities. The pupils of her eyes were widely dilated, there was no reaction to light, and her knee-jerks were absent, and—could not be obtained.

Q. Did you detect the odor of alcohol on her breath?

A. The odor of alcohol was very strong on her breath.

Q. What was your diagnosis, at that time, as to just what was the matter with her, Major Strickler?

A. An early state of polyneurotic alcoholic psychosis.

Q. Will you just explain to the jury, in their language, what you mean by polyneurotic alcoholic psychosis, doctor?

A. Simply a disorder of the mind characterized by these hallucinations, and the idea that she had been doing certain things which she had not done, and this mental picture was associated with the neuritis which included the impairment of her vision, amounting to practical blindness, the loss of knee-jerks and her complaint of numbness in the extremities.

Q. Now, doctor, from your knowledge as a physician, can you tell the jury what are the symptoms of mercuric poisoning?

A. Mercuric poisoning—different types, in that it usually comes on with a mercuric stomatitis, commonly spoken of as salivation, in which there is soreness of the teeth, sponginess of the gums, which bleed easily, and which may go on to even death of the gum tissue, allowing loosening or falling out of the teeth. There is damage to the kidney, which manifests itself by certain changes in the eye grounds and in the urine, that is produced, and there is vomiting and a diarrhea—abdominal pains.

I observed nothing that might be attributed to mer-
357 cury poisoning, except the vomiting. Vomiting nearly always occurs in severe cases of alcoholic poisoning. She did not have or complain of pain in her abdomen and there was no evidence of mercuric poisoning in her mouth. I have seen a great many "mercuric mouths" during the time I have been practicing medicine. I did not examine her heart or her lungs at that time. I stayed probably twenty minutes that night and prescribed a sedative and do not remember what it was. I examined her heart a couple of days later and the heart sounds were weak, and appeared muffled; that is, they did not have the normal strength behind them that the heart should have. Major Hawley, chief of the Medical Service was called in the next day. I went to see her every day for some four or five days. I dropped out of the case for awhile and then returned at a later date and saw her at irregular intervals for a period of about two weeks. I did not see her after June 1st.

Q. Who did you consider was in charge of the case?

A. I considered Major Hawley was in charge of the case.

Mr. Brewster: We object to that, and ask it be stricken out as calling for a conclusion.

Mr. Kagey: Why?

The Court: It will be stricken out, gentlemen of the jury, and not considered.

Mr. Kagey: Q. Do you know who was in charge of the case?

A. Other than what I have said?

The Court: That is stricken out as a conclusion of the witness, and the question calls for a conclusion, your question.

Mr. Kagey: I asked him now if he knows.

The Court: No—yes, he said the same thing. The question and answer was calling for the conclusion.

Mr. Kagey: The answer you objected to, and not my question?

The Court: Both; both are not proper.

Mr. Kagey: We note an exception.

I stopped attending Mrs. Shepard on account of the confusion that attended the case. I saw her for a week after I first attended her. Her condition the last time I saw her was: impairment of vision had improved and it was possible to break through her confusion and get some relevant and coherent answers from her.

Q. Doctor, what would those symptoms you have just described indicate? That is, what condition, if you know?

A. The mental picture?

Q. Yes.

A. The plain fact that Mrs. Shepard had been confined to her bed for a number of days, she would tell me how she had gone down to Junction City that morning, or sometime during the day, and the various shops she had visited, the various ladies of the post she had conversed with, and how they would come home, and how they had lunch together, and played bridge in the afternoon, and where they had spent the afternoon, all of which was utterly impossible.

Q. What would you say that those symptoms that you have described would indicate she was suffering from.

A. Polyneurotic alcoholic psychosis.

This condition is known as Korsakoff's syndrome, and
358 is caused typically by the long continued use of alcohol.

I knew in a general way that Mrs. Shepard had a history of alcoholism. At the time I went up to see Mrs. Shepard I do not remember seeing any medicine there on the table. There was a dresser near her bed. I do not remember seeing anything on it.

Cross Examination.

I have never seen death from this trouble, I saw her suffering with. Never in my life. I did not see Mrs. Shepard die at all and would not say she did not die of this disease. I have nothing to think she did. I do not think this disease I found causes the ulcerations in the stomach. I do not think it could cause a big ulcer in the bowel. From what I saw I did not suspect mercury at the time.

Q. I will ask you if you did not ask Major Shepard, the very night you were there, if it were not possible that she had got bichlorid of mercury in the liquor?

Mr. Kagey: We object to this as not cross examination.

Mr. Brewster: I asked what the major told him.

Mr. Kagey: We object as not cross examination.

The Court: You may answer.

Mr. Kagey: Note an exception.

Mr. Brewster: Q. Did you not tell him that?

A. I will answer that question, providing I may qualify it in my own way.

Q. Let me ask if you did not say that "I asked Major Shepard if he considered the possibility of some poison in conjunction with the liquor, and his reply was that he had always been particularly careful to see that no poison was kept about the place, and he believed such to have been the case at that time, but still that bichlorid of mercury could be readily obtained, and Mrs. Shepard could have gotten that drug without difficulty, due to the wide use of this drug as a contraceptive measure, to which he replied that, as attending surgeon on the post, he was careful to see that no poisons whatever were kept in his emergency case." I will ask you if that conversation did not take place between you and the Major at the time you were there, learning the history of the case?

A. It did.

I saw this woman before she was ill. I did not make an examination of her but from her outward appearance she seemed to be all right. A short time before that Major Shepard asked me if I could observe her from time to time and see if she showed any signs of depression. I did not have that in mind when I diagnosed the case. I have heard in a general way that she was addicted to intoxicating liquor over a period of 7 or 8 years. One person I heard it from was my wife.

Mr. Brewster: Q. I will ask you if in diagnosing
359 this trouble as this psychosis, you did not take into consideration what you had heard about her from other people?

A. One always does that in making a medical diagnosis. Naturally, I talked with Major Shepard frequently about this case.

Q. I ask you, in this case; did you do that in this case?

A. The only persons from whom I heard it who is here now is Major Hawley.

Q. And he asked you in the very beginning, to tell the McCoskeys when they came, she was suffering from the drink habit?

A. When he told me they were coming, he asked me to tell them that.

Q. He told you to be sure and tell them?

A. Yes, sir.

Q. In a few days, he came to you again, and asked you if you told them that?

A. Yes, sir.

Q. You got suspicious then?

A. I did not get suspicious; I thought it was rather peculiar. This woman had no evidence of mercury mouth that I saw at that time. Q. Why, did you tell the jury she had no evidence of mercury mouth if you never saw it? (Objected to as argumentative.) A. One does not have to see the mouth. (Exception noted.)

One does not have to see the mouth, the fetid odor develops there, and if a person has stomatitis to any degree, one could notice it. I said she complained of her mouth being sore in about 10 days, and her breath was fetid. She had no evidence of a mercury mouth that night. I have read that if a person takes bichloride of mercury the sore mouth and fetid condition will develop within half an hour. I prescribed a sedative for her and watched to see if anything else developed that could be treated. I just observed her as far as checking on her mental condition was concerned. This condition I found was typically alcoholic, that is almost habitually, following the use of alcohol. It may be due in isolated cases to metallic poisoning and lead and arsenic.

Redirect Examination.

When Major Hawley and I were supposed to go to see Mrs. Shepard together, one morning after I first saw her, something came up that made it impossible for him to go with me. I had a talk with him and told him she had Korsakoff's Syndrome.

Major Hawley said he was not surprised. He had been to see Mrs. Shepard sometime back and she was so full of liquor that he could not get anything out of her then.

Q. Major, could this alcoholic condition, that you have described and which Mr. Brewster and I have talked about, be due to an acute mercuric poisoning?

A. I cannot conceive of it being due to that.

Q. Was Mrs. Shepard's mouth salivated at any of the times you examined her?

A. The last time, during the last day or two that I was over there, which I stated was about 10 days—

Q. Yes?

A. —her mouth was sore; as to whether it was salivated, I do not know, because I had nothing to do with that. The dental officer took care of her mouth.

A. Because I had known something of Mrs. Shep-
360 ard's mental condition, and the history of mental disorder in her family, and in a general way, of some domestic infelicity, and that I did not think it would be unusual for a person to decide to end the situation in that manner.

Q. I am asking you now, however, about the symptoms, and why you did ask about bichlorid, if you knew bichlorid could not possibly bring about any of these conditions?

A. As far as the clinical symptoms were concerned, I had no thought of bichlorid, because in the state of Kansas, anyone could buy bichlorid, and there was no reason why she could not have bought it.

J. C. Dye was called as a witness on behalf of the defendant, testified as follows:

I am a Major in the Medical Service of the United States Army. I graduated from North Carolina Medical School in 1905. I took post graduate work in New York City in eye, ear, nose and throat and specialized in them. I entered the Reserve in 1917, and was called to active duty in 1918, and

I have been in the army ever since. I was called to see Mrs. Shepard the morning after the night she had taken sick, on May 21st. I do not recall whether Major Hawley or Major Shepard called me. I examined her eyes. Her vision was very bad. The pupils were widely dilated, and, upon examination of the interior of the eye, the retina was very much engorged. The disc was irregular, and in color I would say it was sort of a reddish wine, or deep-pink, showing a little inflammation of the disc.

Q. Did you notice what the retina of the eye showed?

A. It was very much engorged with blood, so much so that I could not pick out the individual blood vessels.

Q. Would you say that the condition of the eye was severe?

A. Very.

Q. Have you ever seen a condition of this nature in the eye?

A. I do not think I have.

I think the significance of this is that there was an absorption of some toxin. I noticed her vision. She could see things very dimly, she knew color in front of her vision, she could see, but she could not count fingers. Her vision was blurred. I thought her eye condition at that time was due to salicylic acid. I think possibly it could have been due to the use of bad liquor, bootleg liquor. I have never seen in mercuric poisoning; the conditions of the disc and retina as I have described. I have seen very few cases of mercuric
361 poisoning. I imagine I visited Mrs. Shepard 10 or 12 times. Major Shepard was always there when I was.

Q. Did you have any conversations with Mrs. Shepard about her condition?

A. Yes, sir.

Q. How often?

A. Oh, I do not know; 3 or 4 or more times.

Q. What did she say to you in these conversations?

A. I do not remember the exact condition. She gave me the impression that she was very much annoyed by so much treatment.

At times she was confused mentally and could not
362 carry on a connected conversation at all. On one occasion the mental confusion was very marked, and the next day when I went back, she said, "I feel better today. I was pretty badly off yesterday." There was a dresser or table by her bed, and in examining her I had to move it back

out of the way. I remember seeing capsules there on the table. I thought about five or six, maybe more. At the time I treated her, June 1, I observed about a pint bottle there on the table. I did not examine the bottle; I had heard what it was. The capsules that were lying there had a white powder in them. I went to the laboratory at Ft. Riley on Sunday morning following her death on Saturday, and I saw some viscera in a white enamel tray. There were samples of intestines and what appeared to be sections of stomach. Major Rose accompanied me and we made an examination of that viscera. There were a number of ulcers varying in size and the laboratory assistant Gade, came in and I told him to get me some sterile slides and I made about three smears, swabbed it into these ulcers. Monday or Tuesday Sergeant Gresser called me, or told me, that he had found Vincent's. I went over to the laboratory. Major Strickler went with me. Sergeant Gresser showed me this strange specimen under the microscope. I was not a laboratory man and he got out a bacteriology and showed me the pictures of these different organisms and pointed out what he said was a slight difference in the curve of this spirilla, at least I was satisfied that it was spirilla. I heard the testimony of the chemists and Doctors who testified for the Government in this case, and I am familiar with the symptoms and effects of Vincent's stomatitis. People do die from that.

Q. Going back to the time you were visiting Mrs. Shepard, did you ever have any conversation with her in which she said anything about getting well?

A. Yes, sir. I only recall conversing with her once or twice about that. She appeared to be annoyed from so many examinations.

Q. Yes.

A. And said "Why do they not let me alone? I do not want to get well, anyway."

Q. Yes.

A. I tried to kid her out of it.

Q. Just what did you say to her?

A. I said, "you better forget that; you know what life is: if you are dead you are a long time dead." I tried to kid her out of it. I said, Mrs. Shepard, I know the annoyance you have, but I was sent over here—

She appeared more annoyed than depressed. I never
363 observed any salivation of her mouth at the times I

treated her. In a general way I know the symptoms of mercury poisoning. I did not discover any of the general symptoms of mercuric poisoning. What I saw of her, from what I know myself as a physician, I thought it was a malignant case of Vincent's. That is a germ disease. I first thought that her condition was due to salicylic acid which is caused by the taking of aspirin. Large doses might produce it. Aspirin is taken for pain and a great many things.

For running ears in cases of measles, depending on the stage of the case, I use phenol, glycerin, bichlorid, alcohol, boric acid; sometimes bichlorid and alcohol. Sometimes boric acid is used for irrigation. We had a lot of measles, I do not remember just when it was; it was about April, 1929. I kept alcohol with bichlorid in my office on the treatment table at all times. It was a stock solution. Major Shepard and I discussed treatment for running ears in measles cases, but I do not remember the time. That particular prescription I obtained from the New York Post-graduate hospital. I think physicians and surgeons generally use that solution. It is standard in the Post-Graduate course.

Cross Examination.

I have written prescriptions for bichloride and alcohol in the dispensary at Ft. Riley, but I cannot produce the prescriptions. I think they will be found on file there.

Q. Now, you say, you thought she died of Vincent's. You think so now, and you thought so then?

A. That I thought she died of a mercuric—

Q. When did you think that?

A. When did I think that?

Q. Yes.

A. When we got these smears.

Q. But now I asked you now?

A. I do not know; I do not know what she died of.

Q. You did not know anything about Vincent's angina, at that time did you?

A. A little.

Q. I will ask you if you did not make a statement in which you say that one of these slides was showed you; that "Sergeant Gresser told me that he had found Vincent's present. Later he showed me one of the slides under the microscope, and told me to look and see the organisms. Sergeant explained that they were not typical."

A. Yes, sir.

Q. And you said, "I do not do enough laboratory work to be able to be very familiar with the organisms"?

A. Yes, sir.

Q. So you were not familiar with them? "Major
364 Strickler also saw this slide, at the same time, and he said that he was not convinced that there was Vincent's there."

A. Yes, sir, correct.

Q. You saw only a very few organisms on the slide?

A. Yes, sir.

Q. You know, do you not, if she had had such a disease, and it had proceeded to death, that the slide would have been alive with Vincent's, do you not know that?

A. I was told by Sergeant Gresser—

Q. Oh, no, doctor, I am asking you, of your own knowledge, you know that slide would have been alive with Vincent's, do you not, your ordinary test?

A. This was not an ordinary test.

Q. Do you mean to say, right at that time, when you saw a few Vincent's, that you could not recognize or be sure it was Vincent's; you do not determine from that information, and that alone, that she died from Vincent's angina?

A. Not that alone.

Q. What else do you determine it from?

A. The blood count, and moderate degree of temperature.
I do not know there would be much fever in metallic
365 poisoning. I never tried any myself. I think there are quite a few cases of death reported from Vincent's Angina; I had one of it myself at Ft. Riley. In that particular case the man had a bad tooth and it extended up into the eye and got into the brain. I never saw a case where they died of it in the intestine. I would not say that I never heard of it.

Q. Would the fact that 2½ to 3 grains of mercury was found in this woman's body at death, change your mind any as to what caused her death?

A. If I knew how it got there.

Q. Regardless of how it got there.

A. I do not know.

Q. You know mercury eliminates, do you not?

A. Yes, sir.

Q. You know, too, if 2½ grains of mercury were found

in her body after her death and she was taken sick on the 20th, you know it must have been a large amount, or taken in small doses, do you not?

A. For instance, the stomach and intestines were lying on the table. I could have dropped a bichlorid of mercury tablet, or anyone else could have.

Q. That would not have any effect on the ulceration of the stomach, would it?

A. I do not think so.

I say it is possible to have a chemical mixture indicating a bichloride of mercury poisoning after 2½ grains of mercury is mixed chemically with the protein of the organ. I do not know of any reason for anyone throwing bichloride of mercury on those organs and I do not tell this jury that anyone throwed mercury on there. I do not have any suspicion of that kind.

Q. What you knew about that being Vincent's was that you saw a few organs and they were something like those that were showed you in the bacteriological book.

A. Yes, sir, I saw them.

I do not recall how many conversations I had with Mrs. Shepard. I made a statement and signed it and this signature shown me is mine.

Q. I thought you said she told you she did not want to get well?

A. Yes, sir.

Q. But if left alone, she would get well.

A. She appeared very much annoyed.

Q. She told you, later on in her illness, "Doctor, that she did not think she would recover.

A. I do not recall.

366 Q. Well, look at your statement.

A. All right, sir; yes, sir (examining paper).

A. That is correct.

I dictated this statement to a stenographer and after she transcribed it I read it and signed it. In that statement I said that the grounds presented a picture of acute poisoning, "the nature of which I do not know." I also stated that her pupils returned to normal and when I came back 5 or 6 days afterward they were then dilated again. I did not say in the statement that I had any suspicion that she died of, or render any opinion that she died of Vincent's Angina, or

Trench Mouth, but I think that statement shows in those smears.

Q. You say Sergeant Gresser examined that and told you it was not typical of Vincent's Angina?

A. A slight variation.

Q. I want to call your attention to this statement, "During Mrs. Shepard's illness and at the time of her death, I had not formed any definite opinion as to what might have been the cause of her illness or death."

A. Yes, that was at the time of the death.

Q. Yes?

A. These smears I did not get the report until 2 or 3 days after.

The report I dictated said nothing about what I thought was the cause of her death.

Redirect Examination.

Mr. Glass of the Department of Justice was present when that statement was prepared and it purports to have been made on Jan. 10, 1930. I have glanced at the statement and will state there is nothing in there materially different than what I have testified.

Exhibit KK offered and received in evidence.

Defendant's Exhibit KK.

Statement by J. C. Dye, Major, Medical Corps, Ft. Riley, Kansas.

January 10, 1930.

I first became acquainted with Major C. A. Shepard
367 shortly after his arrival for duty at Ft. Riley, Kansas, about September, 1928. I met him at the hospital. Soon after, we called at their quarters, and at that time I met Mrs. Shepard. I may have become acquainted with her a few days before that. We were at home when they returned the call. Soon after that Major Shepard went to Texas to school, and on several occasions during his absence, we would drop in and call on Mrs. Shepard, and occasionally she dropped in at our quarters. She has been in our quarters for card parties, etc., and we became fairly well acquainted with her. After his return, our daughter had a guest with her, and they were invited to Major and Mrs. Shepard's for dinner one Sunday. Major Shepard returned from the Flight School

in Texas about the first of December, 1928. After his return, Mrs. Dye and I occasionally saw them and visited them.

About the middle of May, 1928—the exact date I do not recall—I was informed that Mrs. Shepard had become ill at her quarters. The day after she took ill, Major Shepard requested that I look at her eye grounds, advising me that her vision was impaired. Her pupils were widely dilated, and she stated that she only saw outlines of objects. The eye-grounds presented a picture of an acute poisoning, the nature of which I did not know. The retina was very red and the blood vessels engorged. Under treatment which consisted of rest and cool applications to her eyes, her vision returned in about a week or ten days. The dilation of her pupils returned to normal. I did not see her for probably a week, when this eye condition returned, but of less severity. This cleared up in 5 or 6 days, and I was not called to see her again.

I first visited her the day after she first became ill. My visit that day was in the morning as I recall. Thereafter for the five or ten days before the first appearance of eye disorder disappeared, I visited her about every day. About ten days or two weeks after she became ill, I was informed by Major Rose that he had been called to examine Mrs. Shepard, and that he diagnosed the condition as Vincent's stomatitis. During my visits prior to the time her first impairment of visoin had disappeared, I had not been informed of any disorder in her mouth, and at no time was I ever called upon to examine her mouth and made no such examination. Sometime during her illness I had been informed that Mrs. Shepard had some devitalized teeth. I was called in this case for the eye condition only, and had nothing whatsoever to do with the general treatment.

During the course of her illness, Major Shepard never gave me at any time, an idea as to what he thought was the cause of her illness, but he did state that she had a bad heart. He never told me anything about her being a heavy drinker.

Mrs. Shepard never told me anything during her illness as to what she thought might be the cause of her illness, but she did state after she had been ill four or five days that if she was let alone, she might "snap out of it." She told me later on in her illness that she did not think she would recover. The impression that I got was that she was being annoyed with so many different ones treating her, and the medicine that she was receiving. She took nothing internally that was

prescribed by me. I suggested early in her illness that she be given a dose of calomel. This suggestion was not favorably received by Major Shepard and Major Hawley, and so far as I know, no calomel was given.

I do not think that her eye condition was due to either alcohol or tobacco, because in poisoning by these substances the onset is usually gradual, and so far as I know, never sudden. In alcohol and tobacco poisoning, the eye symptoms occur very slowly, covering a period of months.

I last saw her about a week before her death. So far as I know, her eyes at that time were about normal. I was not present when she died, and did not see her on the day of her death.

368 On the day of Mrs. Shepard's death, Major Rose and I called on Major Shepard and about nine o'clock in the evening to extend our sympathies. He was very much upset, and told us that General Symonds and Col. Grissinger had come to his quarters, and entered in a somewhat rude manner, and that then General Symonds had told him that he would have to have an autopsy performed; that he hoped that he (Major Shepard) would not object, because if he did, he (Gen. Symonds) would request higher authority to order it. Major Shepard stated that it was all uncalled for; that he personally had no objection to an autopsy; that he had nothing to hide, but that during a previous illness of Mrs. Shepard, she had made him promise that no autopsy would be performed on her body when she died. Other callers came and we left.

The next morning in the laboratory at the hospital, Major Rose and I saw parts of the stomach and intestines which has been removed from Mrs. Shepard. We looked at the ulcers, and I took two cotton swabs and rubbed them in some of the ulcerated areas, and turned them over to the enlisted man in charge of the laboratory (Serg. Gresser was not there), with the request that they be turned over to Sergeant Gresser to examine for Vincent organisms. Several days later, Sergeant Gresser told me that he had found Vincent's present. Later he showed me one of the slides under the microscope, and told me to look and see the organisms. Sergeant Gresser explained that they were not typical. I do not do enough laboratory work to be able to be very familiar with the organisms. Major Strickler also saw this slide at the same time, and he said that he was not convinced that there was Vin-

cent's there. I saw only a few organisms, which were somewhat like those shown in a bacteriology book, but were not exactly similar. There was some difference, which Sergeant Gresser said was due to the formaldehyde in which the intestines had been overnight. In laboratory matters I depend almost entirely on Sergeant Gresser's word. I, personally, am not familiar enough with Vincent organisms to state that what I saw positively was Vincent's.

Later Major Shepard was informed by either Major Rose or myself—I do not recall which—that Sergeant Gresser had reported Vincent's organisms present in the slides made from the ulcers. Major Shepard said that he was glad to know that, and said something to the effect that apparently that solved the question as to the cause of her death.

So far as I know, Mrs. Shepard's health was not bad. I had heard that she suffered from neuritis or rheumatism, but I had no first-hand knowledge of it. When I saw her before she became ill she was apparently in good health. As to her drinking habits, I do not think she was a heavy drinker. I would say a very moderate drinker, which, in my opinion, in no way affected her health.

During Mrs. Shepard's illness and at the time of her death, I had not formed any definite opinion as to what might have been the cause of her illness or death.

(Signed) J. C. DYE,
Major Medical Corps, U. S. A.

Mr. Glass was present when that statement was made
369 and there is nothing in it materially different than what I have just testified, "defendant's Exhibit KK being statement of J. C. Dye introduced in evidence." I know that the book called "The Medical Part of the United States Army in the World War, Volume 9, Communicable and other Diseases" is an authoritative work issued by the surgeon-general under the authority of the Secretary of War and authorized by an act of Congress, is a standard work and at page 507 reference is made to the prevalence of Vincent's stomatitis in a number of deaths in the United States Army.

Mr. Brewster: We object to that.

The Court: Sustained. The deaths that occurred in the World War would not throw any light on the subject.

Mr. Kagey: They asked if he had heard of any deaths from it.

Mr. Brewster: He said that he had.

Mr. Kagey: He said that he did?
The Court: Yes.
Mr. Kagey: And he was asked as to the number of deaths. He said, as I remember, he could not tell the exact number.
The Court: This statement is not involved in this problem.
Mr. Kagey. Note an exception to the ruling of the court.

Walter A. Rose was called as a witness on behalf of the defendant and testified as follows:

My name is Walter A. Rose. I am 39 years of age. I am a Major in the Dental Corps of the Medical Dept. of the U. S. Army. I graduated in dentistry from the Ohio State University Dental College in 1917 and came into the Army that year. I have been stationed at a number of Army posts, was overseas approximately one year in France, and two years in Germany with the Army of Occupation. After my return I was at Camp Jackson, So. Carolina, Jefferson Barracks, Missouri, and Fitzsimmons Gen. Hospital where I was on duty three years. From there I went to Ft. Riley and stayed there approximately 3½ years; and from there I went to the Army Dental School at Walter Reed Gen. Hospital, Washington, and from there to the Medical Field Service School at Carlisle Barracks, Pennsylvania; and from there I was due to go to
Foreign Service and was to sail on December 2 for
370 Gorgas Hospital, but my orders were amended so that
I could be present here at the trial. I have treated Vincent's infection of the mouth almost continuously since 1918. The cases were too numerous to mention. It was called trench mouth during the War, Vincent's infection is infection of two organisms, living together, whereever you find one you find the other. One is a spirochete, named after Vincent and the other is bacillus fusiformis. When they are found together they cause what is known as Vincent's infection. I was stationed at Fort Riley in May, 1929. I know the effect of mercuric poisoning on the mouth and have treated a great many cases of that.

I had known Major and Mrs. Shepard prior to the
371 time of her illness and death. I first met Mrs. Shepard
at Fitzsimons General Hospital when they were stationed there. A few months after my arrival there Major Shepard and his wife left for the Philippines. I was called

to treat Mrs. Shepard during her last illness. I do not remember the exact date but it was either fourteen or fifteen days before her death. I think it was Major Shepard who called me. I examined her mouth. When I got near the bed I detected an odor, a fetid breath. I examined her mouth and found Vincent's, as it is determined clinically and my diagnosis was Vincent's infection. I know the conditions of the mouth in cases of mercuric poisoning and I did not see any evidence of that. There was a grayish-white membrane about the gums from a half to three-quarters of an inch up and down from the teeth, just confined to the soft tissues. There were a few small lesions and some large lesions where apparently the small lesions had fused. The grayish-white membrane is very thin, and easily removed and it leaves a raw, bleeding surface. Vincent's infection causes the patient to have a very peculiar breath. It is not the same as the breath which comes from mercury mouth. Mrs. Shepard's breath had the odor of Vincent's. Her mouth was slightly salivated. She had some bleeding of the gums upon slight pressure which is a condition usually found in Vincent's. There was no bluish discoloration of the gums and her gums were not spongy. They had this grayish-white membrane over them and were otherwise normal. Salivation and loosening of the teeth and bluish discoloration of the gums are symptoms of mercuric poisoning. I did not make smears from her mouth for a microscopic examination because the condition of her mouth was so characteristic and typical of Vincent's I did not think it necessary. I asked Mrs. Shepard how long she had had that trouble and she said it had been sore for quite some time. I gave her a mouthwash of bichlorid, mercuric chlorid, 1 to 2000, hydrogen peroxid the second line, the third line AA to QS 500 cc., one pint. That is approximately sixteen ounces. If the prescription was filled according to the way it was requested, there should have been
372 approximately two grains per pint. I also used chromium acid, followed by straight hydrogen peroxid. I directed that the solution of bichlorid of mercury and peroxid be used as a mouthwash every two hours while the patient was awake. I told Major Shepard and the attending nurse. I told Mrs. Shepard, Major Shepard and the nurse that it was a poison, contained poison, and she would have to be very careful not to swallow any of it. The bottle had "Poison" marked on it. In an infection like hers a good, comfortable

mouthful would be used for a mouthwash at a time, not less than one ounce, and sometimes more. Mrs. Shepard used that mouthwash from the time I went there until the time of her death. The bottle was there every time I went. I could see how much had been used out of it during my absence. I administered it every time I was there. During the two weeks or fifteen days I treated her I went once a day and part of the time twice a day. I could see from the appearance of the bottle that it was diminished in volume so I took it for granted it was used according to my instructions. It was kept on a table adjacent to the bed. Mrs. Shepard was strong enough to reach for things on the table she wanted herself at the times I was there, and I have seen her reach for things on the table. I would estimate that the bottle was refilled three or four times. I think there were four or five pints of this solution used during the time I treated her. I cautioned Mrs. Shepard not to swallow any of it and told them that it was to be used every two or three hours while she was awake. Mercury is sometimes absorbed through the gums and gets into the system without the patient swallowing the solution in which it is contained. I noticed a steady, gradual improvement in the condition of her gums from this treatment. Miss Brown, the nurse, never told me that she had disobeyed my instructions and given some other kind of mouthwash. If any other mouthwash was used then the one I prescribed I did not know it. There were several other things on the table beside the bed where the mouthwash set. I saw some capsules there several times, about eight or ten.

They were filled with a white substance.

373 Q. At the time you were treating Mrs. Shepard, did you have any conversation with her about getting well?

A. I did.

Q. How many times did you talk with her about that?

A. 5 or 6 times, I should judge. I cannot remember exactly.

Q. Just tell the jury what she would say to you about that these times that you discussed it with her.

A. When I first went over there, when I made my initial visit, she said that she was glad to see me, because her mouth was paining her, and I assured her—tried to assure her at least, that within a couple of days, two or three days, her mouth would be feeling better, and she told me at the time that she did not care to be treated, in a way, but if my treat-

ments would make her mouth better, why, she was willing to use it.

Q. Did she say anything, at that time, or to you any other time, about wanting to get well or not?

A. She did.

Q. What did she say?

A. On another occasion I said, "Mrs. Shepard, you are going to get well;" and I said, "You are looking better, and you are going to get well." She said, "I do not want to get well."

Mr. Kagey: Now, go right ahead, Doctor, and tell what she said.

A. On another occasion, I remember she said, "Why, do you not go away and leave me alone," I said, "Mrs. Shepard, you should not talk like that;" I said "Everybody is doing everything they possibly can to make you well." She said, "I do not want to get well, I want to die, I do not care to live."

I certainly would not use a mercury solution in treating a mercury mouth. If Mrs. Shepard had had a sore mouth caused by mercury poisoning, the mouth would have gotten worse under a mercury treatment. In her case there was a gradual improvement. Nine or ten days before her death, Major Hawley came to me and talked about having some teeth pulled. I advised against it. She had three devitalized teeth. Major Hawley did not say anything further at that time. The next time I was called down to the office of Colonel Grissinger, the commanding officer of the hospital, Major Hawley was present. Colonel Grissinger said, "Captain Rose, what do you think of going down to Major Shepard's quarters and extracting those devitalized teeth for Mrs. Shepard?" I had never talked to Colonel Grissinger before about it. There was some conversation and he said, "Captain Rose, suppose I should direct you to go down to the quarters and do that?" I said, "Col. it is absolutely contrindicated, to the best of my—" After my conversation with Col. Grissinger I was informed that Mrs. Shepard had been brought to the hospital and had been brought there for the removal of these teeth. I had her heart examined before I injected the anesthetic. She was brought on a stretcher from a room up to the dental clinic and I removed these devitalized teeth, after which she was taken to a room in the ladies' ward. She stayed in the hospital approximately two days and was then

374 taken home. I continued to treat her and give her the mercury solution. I was there the morning she died. I talked with her. She died that afternoon. The blood transfusion occurred about two or three hours before her death. I treated her mouth with bichlorid of mercury mouthwash about 11:30 or 12:00 o'clock the day she died. The day following Mrs. Shepard's death, Major Dye and I went to the laboratory. I saw some viscera in the basin on the bench and in about eight or ten minutes the corps man came in who was assigned to duty there. We got some sterile slides and made smears from the ulcers in the intestines. I saw the ulcers and learned from the man in charge that it was the viscera of Mrs. Shepard. We gave the smears to the corps man and told him to give them to Sergeant Gresser upon his return. The viscera was partially in a solution which smelled like formaldehyde. It was not entirely covered. The laboratory was unlocked when we got there and nobody else was in the room. After Sergeant made the examination he reported to me that he had found Vincent's and I went over and checked it myself and Major Dye went with me. I know Vincent's germ when I see it. I would say that the germs were Vincent's. I was firmly convinced. I found both the spirochete and the bacillus fusiformis as normally as I expected to find it. I checked the report of Sergeant Gresser with a microscope. The tray in which the viscera were when I found them was a rectangular, white-enameled basin. I cannot give the exact dimensions. I was at Mrs. Shepard's house to see her a good many times when the nurse was not there and when Major Shepard was not there. I would say probably one-third of the time. I would from time to time ask the nurse if my instructions were being carried out with reference to the mouthwash and she said they were. I asked Mrs. Shepard if she was taking the mouthwash and she said she was. She said her mouth was feeling so much better and she was willing to follow my treatment. I left the prescription for this mouthwash at Fort Riley and it should have been on file at the pharmacy at the hospital. I asked Sergeant Rose, who is the man in charge, and he told me that
375 it had been destroyed. After the first prescription was filled it was not necessary to write a new prescription as they were refilled automatically. I have heard and read of fatal cases of Vincent's infection. I know that it is fatal in some cases. I was visited by Mr. Glass, the Government

agent at Walter Read General Hospital on Dec. 10, 1929. I was not subpoened before the grand jury at Topeka; I made a statement for Mr. Glass on the morning of December 11, 1929.

Cross Examination.

Mr. Brewster: —Did you so treat her that she could have had in her body 2½ to 3 grains of bichlorid of mercury at her death?

A. I am not a pathologist.

Q. At the time you gave her this mercury, you had no idea there was any danger of the use of it, properly applied, did you?

A. I did not. I used that treatment for a number of years.

Q. You never in your life used that treatment in such a way that would leave 2½ to 3 grains of mercury in the body after death, did you?

A. I do not know. I expect not. The nurse told me she was giving this treatment all the time.

Q. All right then, in your statement, to which your attention was called, I want to ask you if you did not state, "Mrs. Shepard's nurse once told me that she did not regularly carry out my orders with the use of the mouth-wash." Look at that. (Handing paper to witness.)

A. (Examining paper.) That was a day or two following my initial treatment of the case.

Q. But, you have just sworn that she never at any time, told you that she was not carrying out the instructions regarding the medicine.

(Objection by Mr. Kagey as argumentative and not proper. Overruled and exception noted.)

Mr. Brewster: Q. Did you not swear to that?

A. I said I asked the nurse from time to time if my treatments were being carried out.

Q. Did I not ask you a moment ago if the nurse ever told you she was not using it, and you said "no."

A. No, I did not understand it that way.

I made the statement that "Mrs. Shepard's nurse once told me she did not regularly carry out my instructions as to the use of the mouth wash." I took a slide of this viscera in one of those pictures. I took it along with some other slides that I had as a matter of record in certain cases that I had treated. The slide was lost in the laboratory of the Army Dental

School at Walter Read Hospital. I do not remember going to the Doctor and telling him to remember what I found in case of any trouble coming up. I did not go to Dr. Shepard and tell him that I had examined and found Vincent's, mounted the slides and if there was any trouble I had these slides locked up. I have had a death from Vincent's Angina. It was several years ago at the hospital at Ft. Riley. It did not effect the stomach and bowels.

From my conversation with the Commanding Officer,
376 I took it to mean that I was ordered to extract these teeth. I did not say anything in the statement I made to Glass about having made these smears because at the time I did not care to have the surgeon know about my making these smears. I thought perhaps he would not like it. I was not present at the autopsy; I was not invited or asked to be present at the autopsy. That is the only reason I did not want anybody to know about the smears. I dictated the statement I made.

Q. Did you give her any other wash except this mouth wash?

A. I treated her locally with chronium trioxid—

Q. Did you give her anything else?

A. —followed by hydrogen peroxide, immediately.

Q. Lavoris, did you give her that?

A. I did not.

Q. Not a bit; you are positive about that?

A. I am positive about that.

In that statement I did say, "I went to Major Shepard's quarters and made a clinical examination of Mrs. Shepard's teeth—I found a condition of the tissues of the mouth which was clinically diagnosed by me as Vincent's stomatitis, the clinical appearance present not only Vincent's stomatitis, but a mixed infection. There were some pus producing organisms and bleeding of the gums.

In Vincent's Angina, you have an ulceration, they may be large or small, you have grayish white membrane which is easily removed and, pain around the gums and a bleeding of the tissues. It usually comes on gradually, altho all cases are not the same.

Q. When they are first taken with Vincent's, do they not collapse, and lose their mind, and become befuddled, and pick things out of the air?

A. I have never seen a case that did that. I first saw this case about 14 or 15 days prior to her death and my diagnosis was Vincent's.

Q. I am asking you what you thought ailed her at that time?

A. All that I know that was ailing her was Vincent's infection. That is all I saw.

Q. What is there about Vincent's that would cause the woman to collapse and have the eye grounds inflamed?

A. That is out of my field of practice; I cannot say as to that.

I cannot say as there being anything about that to cause that condition.

Q. I am asking you how you diagnosed correctly the disease without knowing all of its symptoms.

A. You have both local and general symptoms and general symptoms I am not familiar with. I do not know whether she had any of the general symptoms or not. I do not know what effect Vincent's Angina has on the stomach, the little gut, the big gut, or the spleen. I never heard of its having any on the kidney.

I said when I commenced to administer this solution
377 to this woman her mouth condition improved, and kept improving right long just as long as I continued it and up until the last day.

Q. Did not her condition, so far as Vincent's Angina was concerned, apparently clear up until the day of her death?

A. Locally it did, in her mouth.

The symptoms in the oral cavity improved and they
378 are the only ones I know anything about. I do not know, only what I read, spirochete is found anywhere in the system. Vincent's is found in the saliva of a normal mouth without having effected the tissues; the presence of those spirochete organisms does not necessarily mean that one has Vincent's Angina.

I did not take a swab from the mouth because the clinical symptoms and findings were so characteristic of Vincent's that I did not deem it necessary. I have had reports on cases where a temperature was raised some.

Q. Do you not know in a severe case, the fever runs very high?

A. Some cases, I have gotten reports that they had no temperature at all, and others they have some temperature.

Her mouth was very foul when I first saw it. I have universally used the treatment of bichlorid of mercury and hydrogen and never have known of a case of mercury poisoning arising from that treatment nor have I ever had reason to suspect it. There would be approximately 2 grains of mercury in one pint of 1-4000 solution which I gave.

Q. Then in order to get two grains, she would have to drink the entire pint, would she not?

A. I cannot say as to that.

Q. Will you explain to the jury how she could get that amount without drinking it all or taking it all?—There is a glass and it holds a pint—and in that is dissolved or mixed two grains of mercury—now, in order to get that two grains into the system, you have got to take everything that is in that glass, have you not, Doctor?

A. I cannot testify to that.

Q. Would not common sense teach you that?

A. (No answer.)

I cannot answer that question. I cannot give you an idea. I do not know how rapidly mercury eliminates.

Q. You, know, do you not that those mercuric mouths are caused by the elimination of mercury?

A. Partly. I do not know what form mercury is given for syphilis.

All the symptoms I have seen of mercury poisoning were where the mercury was being eliminated thru the mouth. There was some slight salivation which is had with Vincent's infection. I estimate the bottle was refilled three or four times.

I know Major Hawley. I did not tell him that Mrs.
379 Shepard would not take my medicine and I never told Major Shepard that. She never did complain of my nauseating her. Mrs. Shepard said she was taking it because it was doing her good, that it improved her mouth.

Mr. Brewster: Q. She told you that the mouth was so much better that she was willing to follow your treatment?

A. She did.

Q. And she was pleased with that, was she not?

A. Apparently.

Q. And, apparently happy over the fact her mouth was getting better?

A. She wanted this pain relieved; if I could give her relief from the pain in her mouth; yes, sir.

Mr. Brewster: That is all.

Mr. Kagey: That is all for the present, major. I should like to have Mr. Brewster sworn.

S. M. Brewster was called as a witness on behalf of the defendant and testified as follows:

I am the United States District Attorney of Kansas, and had charge of the presentation of this case before the grand jury. I have the letter which I showed Major Rose at the time the grand jury met. That was the letter which I showed to Major Rose a little while ago. The letter was offered in evidence by Mr. Brewster:

Government's Exhibit 86.

"U. S. Department of Justice, Bureau of Investigation.

"Washington, D. C., December 11, 1929.

"I have been in the Dental Corps of the U. S. Army for the past twelve years. I am a graduate of the Ohio State University Dental School. For about three and one-half years prior to August 3, 1929, I was stationed at Ft. Riley, Kansas, as Dental Surgeon there.

"I became acquainted with Major Charles A. Shepard, of the Medical Gorps, about 1922, at FitzSim*mons* Hospital and was not acquainted with his wife there, as he was transferred to the Philippine Islands shortly after my arrival at Fitz-Sim*mons*. The next time I saw Major Shep*p*ard was when he was assigned from Ft. Omaha to Ft. Riley, in the Fall of 1928, but left shortly after for Brooks Field, San Antonio, Texas, where he remained about three months, returning to Ft. Riley for duty about the first part of December, 1928.

"I met Major Shep*p*ard's wife at Ft. Riley before he left for Brooks Field. Sometime about the middle of May, 1929, I heard that Mrs. Charles A. Shep*p*ard was ill at her quarters. She later died at Ft. Riley, Kansas. While she was ill, I, being a Dental Surgeon at Ft. Riley, was called in on the case to examine Mrs. Shep*p*ard for oral infection. I think that Major Shepard himself asked that I examine Mrs. Shep*p*ard. I do not know at this time the exact date that I was requested to examine Mrs. Shep*p*ard but to the best of my recollection at this time it was approximately two weeks before the day she died.

"I went over to Major Sheppard's quarters and a nurse who was attending her and Major Sheppard were there. I made a clinical examination of Mrs. Sheppard's mouth. I found a condition of the tissues of the mouth which was clinically diagnosed by me as Vincent's Stomatitis, clinical appearance presenting not only Vincent's Stomatitis but a mixed infection. There were some pus producing organisms and
bleeding of the gums. There was a grayish white mem-
380 brane in the gums, sluffing tissues, and some necrosis.
I noticed no voluntary bleeding during the course of my examination but upon a light touch of the tissues, bleeding would ensue.

"There was a very marked degree of fetid breath. There was no evidence of mercurial stomatitis. I asked Mrs. Sheppard how long this condition had existed and she replied that she had had some soreness in her mouth for quite some time. I had no bacteriological examination made because I was firmly convinced of the condition through clinical symptoms.

"I prescribed a mouth wash, as follows:

"Mercuric Chloride, (1 to 2000 strength),
hydrogen peroxide, A. A. Q. S.

"I directed that it be used as a mouth wash once every two hours while awake. I also made treatments by local application of chromium trioxide, 7% strength, immediately followed by application of hydrogen peroxide, full strength. The prescription for the mercuric chloride, hydrogen peroxide solution was filed at the Dispensary and there will be a record of it there. I prescribed a bottle containing approximately 500 C. C.

"Mrs. Sheppard's nurse once told me that she did not regularly carry out my instructions as to the use of the mouth wash. I continued this treatment until the time of Mrs. Sheppard's death.

"The patient was brought to the hospital about five days before her death for the removal of several devitalized teeth, as it was thought the teeth might be a possible foci of infection, having some bearing upon her systemic condition. The teeth were removed by me under a local anesthetic (2% novocaine) about 6 C. C. of this solution used. Whether these devitalized teeth, which were removed, were the source of infection which had anything to do with Mrs. Sheppard's condition, cannot be positively known, due to the fact that many bacteria may exist but their presence cannot be de-

termined either by clinical examination or by an X-Ray. The presence of such bacteria was not in this case established.

"I requested an examination be made of the patient's heart and pulse before operating. The slow response to the treatment was due to the severity of the infection and also to the lowered resistence and vitality of the patient. Maj. Sheppard told me that Mrs. Sheppard had carried these devitalized teeth over a period of several years and that he had, on several occasions, requested her to undergo an operation for their removal but she refused.

"During the course of her treatments for this oral infection, upon my inquiring as to how she felt on particular days, she remarked that she was not any better; did not care to get well, and made remarks indicating that she did not care to live any longer. She seemed to be very depressed and despondent at all times.

"Maj. Sheppard told me that Mrs. Sheppard's heart had not been normal for several years and that he was of the opinion that these devitalized teeth may have had something to do with her condition. It appears to me that Maj. and Mrs. Sheppard were apparently not happy as man and wife. I believe that Major Sheppard was in love with his wife but that this love was not reciprocated. During my acquaintance with them, he appeared to be devoted to Mrs. Sheppard and during her illness she appeared to resent any affections bestowed on her by Major Sheppard.

(Signed) W. A. ROSE,
MAJOR, W. A. ROSE,
Major, D. C. U. S. A."

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381 Edward J. Strickler recalled as a witness on behalf of the defendant, testified further as follows: Other agents beside lead and arsenic can cause the condition I found. There are various toxins such as you get in influenza, typhoid fever or liver diseases, also phosphorus poisons.

Claude W. O'Dell was called as a witness on behalf of the defendant and testified as follows: I am 36 years old and have been practising dentistry at 220-221 Argyle Building, Kansas City, Missouri, for eight years. I have a high school and University education and five years of dental study.

I also lecture on dental pathology in the Kansas City Western Dental College in Kansas City. I am familiar with the symptoms of Vincent's infection.

Q. Will you describe to the jury what those symptoms are?

A. Vincent's infection, either acute or chronic, is generally inflammation of the gingival tissue, that is, the common membranem there is a necrosis, a hyperemia, a sloughing of the tissue, and edema in both upper and lower jaw tissues; many times, if it has been present during any period of time, it is very necrotic.

The proper treatments of Vincent's are arsenical and mercurial compounds. The solution depending upon the individual case. I heard Major Rose's description of the symptoms of Mrs. Shepard and of his treatment and in my opinion that treatment was correct. I have had occasion to treat mercury mouth and I would not by any means use a mercury solution for the treatment of mercury mouth. Mercury mouth would be aggravated by a treatment of mercury and if it were Vincent's it would improve. I do not know whether it would clear up a Vincent's infection in any other part of the body or not. I have only applied it locally.

Cross Examination.

That is absolutely a safe treatment if properly used.

Q. Would you say it was properly used, if after death, it caused between 2½ to 3 grains of mercury in the organs?

A. I could not answer that, or give a judgment.

Q. That would kill the patient you treated that way?

A. It might.

Q. How many have you killed by giving them bichlorid of mercury?

A. None to my knowledge. To my knowledge there have been no fatal cases due to that treatment.

Mr. Brewster: I am asking you about the fatality that results to your knowledge from the mouth treatment, such as you have described.

A. In medical literature there are cases described that come from that.

Q. Tell one single case.

A. Look at Webster, referring to page 435 in Webster's Toxicology and Medicine.

I cannot say as to its frequency. I have never had
382 any fatal results. Mercury is a well recognized and proper treatment for Vincent's.

Q. The proper treatment of any disease is a treatment that is not worse than the disease itself?

A. —You have got to take into consideration the systemic condition of the individual.

It is possibly true that it not good practice to give a treatment that is worse than the disease, only possibly so in case of Vincent's.

Redirect Examination by Mr. Kagey.

Q. In view of the answers to the questions on cross examination, suppose, Doctor, you had a patient who was attempting to commit suicide, and to whom three or four or five pints of this solution were to be administered, and they were placed on the side of her bed, in her reach, and the solution disappeared, and she was found with between 2 and 3 grams of mercury in her viscera after death; would you say that, in a case of that kind, that it might have been caused by the party drinking the solution?

Mr. Brewster: We object to that as being a hypothetical question not based on any facts.

The Court: Sustained.

Mr. Kagey: It is just as fair as the other questions, I think.

The Court: Please do not ask questions like that.

Mr. Kagey: We except to the rules of the court and the remarks of the court.

The Court: Counsel knows that there have been no facts stated in evidence, such as he related in evidence to the witness, and counsel ought not to call that to the witness's attention.

Mr. Kagey: We again except the rules of the court; it is reasonable interference.

If a person intentionally or unintentionally drank this solution while they were using it for a mouth wash, it might cause death. I always label a bottle containing bichlorid mouth wash "Poison" and instruct the patient emphatically that he must not drink any of it.

Recross Examination by Mr. Brewster.

Q. If a person did take bichlorid enough to kill, then it would not make any difference whether he drank it himself or somebody gave it to him, it would have the same effect, would it not, Doctor?

A. It probably would, yes.

George R. Callender was called as a witness on behalf
383 of the defendant and testified as follows: I am a Major in the Medical Corps of the United States Army. I graduated in 1908 from Tuft's College and Medical School in Boston. My practice has been largely confined to pathology. I had some work in the service in the Army, taking care of patients as an attending surgeon. I entered the army in 1912 and have been ever since. My station is Baltimore; I am doing work at Aberdeen, Maryland, and also in Washington, D. C., at the Army Medical Museum. I am acquainted with Major Shepard and first met him on the boat en route from San Francisco to Manila in August 1922. He was accompanied by Mrs. Shepard and Mrs. Shepard's mother. During the trip Mrs. Shepard's mother became ill. She had maniac-depressive psychosis. This is a type of mental disease, characterized by periods of depression and mania. Mrs. Shepard did not stay in Manila but took her mother back to the states. I was associated with Major Shepard while he was in Manila. Mrs. Shepard returned to Manila after taking her mother back to the states and I met him and his wife socially.
384 I had occasion to see her while she was ill.

Q. Will you describe to the jury what those symptoms were?

A. We called socially, not professionally—Mrs. Callender and I. Mrs. Shepard was in bed in their apartment, and was extremely nervous, and moving her hands a good deal, and was extremely fearful—excessively so, it appeared to me—of going to the hospital.

Q. Did she talk with you about it?

A. She said that Major Shepard wanted her to go to a hospital and asked me to persuade him not to send her.

At the time I saw her at Manila I formed an opinion as to what she was suffering from. She was on the verge of delirium tremens. This is a condition occurring from a pro-

longed and excessive use of alcohol. That was the last time I ever saw Mrs. Shepard.

Cross Examination.

Q. After that time you did not see her take a drink?

A. I do not remember having seen Mrs. Shepard take a drink.

Q. Have you prior to this time seen any evidence of excessive drinking?

A. Not that I can recall.

It just struck me while I was there, that she was on the verge of delirium tremens. Delirium tremens certainly does not last for 8 or 10 years.

Redirect Examination.

If drinking to excess were kept up for 8 or 10 years it might effect one's health a good deal.

Recross Examination by Mr. Brewster.

Q. Now, Doctor, they have asked you if it were kept up for eight or ten years: I will ask you now if you would say, from what you heard here and your knowledge of her, that she died from the effect of alcohol?

Mr. Kagey: We object to this as not cross examination.

The Court: You may answer.

Mr. Kagey: Note an exception.

The Witness: I want to get this question just right, now.

Mr. Brewster: Q. I asked you, from what you heard here and know of her drinking, whether you say she died of alcohol?

A. From what I have heard in this court?

Q. Yes, sir.

A. And what I know about her drinking?

Q. Yes, sir.

A. I would say she died from alcohol?

Q. Yes.

A. No.

Q. Of what would you say she died?

A. Mercurial poisoning.

Mr. Brewster: That is all.

Mr. Kagey: That is all. Now, we move to strike out the answer of the witness, for the reason that no proper foundation was laid, and for the reason that it was not proper cross examination.

The Court: Overruled.
385 Mr. Kagey: Note an exception.

Lavenia Allen called as a witness on behalf of Defendant, and testified as follows: I am the wife of Major Oliver Allen and I reside at Fort Leavenworth, Kansas. I am acquainted with Major Shepard. I first met him at Fort Omaha in the fall of 1924. I also met Mrs. Shepard about a month after meeting Major Shepard. We lived four doors from
386 the Shepard quarters. I knew them three years at that time.

Q. How intimately acquainted did you become with Mrs. Shepard?

A. I played bridge with her frequently; I sewed with her, both in my home and other ladies' homes. I saw her—well, I could safely say twice a week, and very often communicated with her every day over the telephone.

Q. Did you visit very often?

A. Yes.

I had occasion to observe Mrs. Shepard's condition, and at times she was very pleasant and other times she was in a very bad mood and would say ugly things both to me and to other people. She would criticize my clothes and hairdress to other people and she would criticize other people to me.

None of us paid any attention to it, because we thought—well, we just sort of took her as she was, knowing that she did not seem to be quite normal.

She complained a great deal about her teeth hurting her. She lost weight; her hands were very cold and her fingernails and lips blue. This condition only begun after I had known her three years. It lasted a year and was still in existence at the time I left. We had numerous bridge games at the post there, and lots of times she would break bridge dates when I invited her and try to get me to break mine.

Q. Where would she be when she broke these appointments?

A. In her own quarters.

Mr. Brewster: We object to this,—

The Court: Sustained.

Mr. Brewster: —tending to show nothing.

Mr. O'Keefe: Q. Did you ever talk to—did Mrs. Shepard ever talk to you about any of her relatives?

A. Yes.

Q. Did she ever talk to you about her Mother?

A. Yes.

Q. What did she say about her Mother?

Mr. Brewster: Objected to as incompetent.

The Court: Sustained.

I talked to Mrs. Shepard about hospitals and doctors generally, and she said that if she ever got the illness she had before she married Major Shepard she did not know what she would do because she would not have another doctor and never expected to have. She told me that the doctors had given her up to die, and she was going to have a good time before she died, and she began eating and drinking anything she wanted to and got well. I spoke to her about going to a hospital and having her teeth attended to and she said that she was afraid of dentists and doctors and she was
387 not going to have any of them take her teeth out. She used to take tablets to relieve the pain from her teeth. I have seen her take as many as two in the morning. She kept them in her handbag and this continued three or four months prior to the time I left there. I saw her take two drinks at the home of a friend during the holidays. I have seen her at times when I did not know what was the matter with her. She was not normal but I did not suspect drink at that time. When she was not normal she had sort of a drooped expression, redness and staring of the eyes, and general relaxation of the face. She did not have that appearance any place other than at her own home.

Q. What about Major Shepard's conduct during that time?

A. Major Shepard would always look very chagrined, and would drop his head.

Mr. Brewster: We object to that as incompetent and immaterial, and calling for an opinion and conclusion.

The Court: Sustained.

Q. Do you recall the conversation of Mrs. Shepard, in which Mrs. Shepard referred to her Mother's mental state, as it may have been affecting her own frame of mind?

Mr. Brewster: Object to that as incompetent and immaterial.

The Court: Sustained.

Mr. O'Keefe: Exception, please.

Mrs. Shepard always maintained a very neat, very clean, well groomed appearance while I was at Fort Omaha. She also gained weight. Besides the tablets which she called pain

tablets, I also saw her take aspirin. She took as much as five grains at a time. I was with her two days when we were sewing and she took an aspirin every hour. Each tablet contained five grains. She took at least three each day during the course of our sewing. She complained about suffering pain from her teeth. She took quite a few perfumed candies for her breath and I do not ever remember when she was not taking them. During the last year that I was there she lost considerable weight. She told me that she had been on a very strict diet and that her weight had gone down from 145 pounds to 116. She did not seem to be in good health.

Q. What was the general condition of her health?

Mr. Brewster: Now, we object to that as immaterial, and not competent.

The Court: Sustained:

Mr. O'Keefe: Exception, please.

388 I do not know anyone who was kinder to his wife than Major Shepard. He bought her gifts and flowers and would do things around the house for her. He gave her handsome linens for the house, bracelets and expensive clothes, and he paid the bills when she bought things to send to her mother.

Cross Examination by Mr. Brewster.

Q. You say the major seemed very affectionate toward his wife?

A. I did not hear you?

Q. You say, the major seemed very affectionate toward his wife?

A. He was attentive.

Q. Affectionate, as you called it.

A. Did I say affectionate?

Q. I am asking you; you must answer me, now, just the same as you did then.

Mr. O'Keefe: Objected to, your honor, as not proper cross examination; the witness did not testify to that, and it is not proper cross examination.

The Court: You may answer.

Mr. O'Keefe: Exception.

The Court: Please read the question.

(Last question read as above recorded.)

The Court: Just answer the question, if you will. You may answer now.

A. Major Shepard was always a gentleman, and never demonstrated his feelings in public.

Mr. Brewster: Q. You say, he gave her gifts—

A. Yes.

Q. —a bracelet; you thought that was a sign of affection?

A. Is there any reason why you cannot answer me, just like you answered these gentlemen?

Mr. O'Keefe: That is objected to, your honor, for the reason it is argumentative.

The Court: Oh, I do not know: she may answer.

A. Can you attribute it to anything? Could you attribute it to anything but love and affection?

Mr. Brewster: Q. To what?

A. I attribute his gifts to love and affection.

She was very peculiar in that she criticized the appearance of my dress to other women. She criticized me to my face.

Q. What did she say to your face?

A. She told me what she thought of my hair; she said that I did not wear my hair as short as I should. I do not remember anything else.

Q. On the strength that the woman said you ought to wear your hair shorter, you say she appeared peculiar, is that right?

(No answer.)

Q. All right, I will go to something else; you say she criticized you to other women?

A. Yes.

Mr. Brewster: Q. Now, you saw her taking a drink
389 once, did you?

A. Yes. I cannot remember now who was there. I was there. Her husband and my husband. There were other people there. I cannot tell you who they were. I cannot remember the time, and I cannot remember the people now.

Q. Is there anybody in the United States, is what I want to know, so we can see about it—Can you name me anybody in Omaha, or anywhere in the United States that was present except yourself and the Shepards and your husband?

A. If you allow me to ask Major Shepard a certain person's name.

Q. I am asking you.

A. I can remember other people there but I do not remember their names.

Q. How did she happen to get one drink?

A. It was served her by the hostess.

Q. Were you there?

A. Yes.

Q. Did you drink?

A. Yes.

Q. Did Major Shepard?

A. No.

Q. Did your husband drink?

A. Yes.

Q. Did anybody else drink?

A. Those that were there.

Q. Was there another drink served?

A. Two drinks were served.

Q. Did you drink?

A. I did not.

Q. Who did?

A. My husband.

Q. Who else?

A. Mrs. Shepard.

Q. Who else?

A. And the rest of the gentlemen—

Mr. Brewster: Q. Who was the hostess?

A. I do not care to answer that question.

Q. I want to know.

The Court: You will answer.

A. I was the hostess.

Mr. Brewster: Q. Then you served the liquor?

A. Yes.

Redirect Examination.

I visited back and forth with Mrs. Shepard and sometimes she would answer the door bell; other times the man would answer and say that Mrs. Shepard was not home when I knew perfectly well that she was.

Mr. Brewster: We object to all of this, what the man at the door said, and move it be stricken out.

Q. What would be her condition, what would be her mood?

A. She would be jolly; more jolly particularly, but not a normal mood, in a normal, friendly mood.

Recross Examination.

I do not think it peculiar that she should stay in her own home two or three days. I thot it was a pretty good thing to stay around the home once in a while. The time she shut herself up 2 or 3 days at a time was sometime between the fall of 1924 and 1927. I was not there every day.

Q. Then how do you know she did not answer the bell?

A. The times I would go over and had an appointment with her.

The reason I know she would shut herself up for two
390 or three days at a time and would not answer the bell because I would often ask someone to call her, and could not get an answer at the door. The reason I know she was shut up because the man would tell me she was indisposed and did not want to see anyone.

Q. Indisposed?

A. Yes.

Q. You call that shutting herself up two or three days at a time, do you?

A. I would try to call her over the telephone, and the man would answer. . . .

Q. You do not know, of your own knowledge, whether she was there or not, do you?

A. I am trying to think back on something that would make you realize that I know what I am talking about. I used to shop some at the commissary, the post exchange, and I would try to get her to find out if she wanted anything, or not, if she wanted me to take her over; she would holler out the window to me she did not, and would not answer the doorbell.

Q. You would stop and ask her if she wanted anything, and she would holler out the window to me she did not, and would not answer the doorbell.

Q. You would stop and ask her if she wanted anything, and she would holler out the window when she did not?

A. Yes, sir.

Q. That was the time she shut herself up, and did not let anybody know where she was, is that right?

Mr. Class: Let counsel be fair with the witness—

The Court: You may answer the question.

Mr. Class: The witness testified she knew where she was.

The Court: Yes; I have heard your argument. Go ahead. Proceed.

Sometimes I would ask her if she wanted me to go to the post exchange for her, she would put her head out the window and say she did not want anything, and I would say, "Are you coming over to the house today?" She said, "No, I am not going out today."

G. R. Callender was recalled as a witness on behalf of the defendant, and testified further as follows: When I was on the witness stand before in answer to a question made by Brewster, I stated that I thought that Mrs. Shepard's death was caused by mercury poisoning.

Q. Now, Major Callender, suppose that this woman, this lady had been using a solution of bichlorid poison, and had used four or five bottles for a mouthwash, and that these bottles of solution contained 1-to-2000 of mercury, and diluted with peroxid so that they contained 1-to-4000, or about two grains of mercury to each of the bottles, and that this mouthwash was used covering a period of about two weeks, two weeks or 15 days, immediately prior to her death: Have you a judgment as to whether or not she could have absorbed enough mercury from that mouthwash to have caused her death?

A. I have.

Q. What is your judgment?

A. That she could have absorbed enough mercury from that mouthwash to have caused her death.

Q. Major Callender, if the deceased had been in the
391 mental condition that has been described here on the witness stand by the doctors who treated her, have you a judgment as to whether or not she could have swallowed, inadvertently, that is, unintentionally, enough of that mouthwash to have caused her death?

Mr. Brewster: To which we object as incompetent and immaterial.

Mr. Kagey: I think the mental condition has something to do with it.

Mr. Brewster: You call up her mental attitude, and then ask if she did it unintentionally, and by mistake.

Mr. Kagey: The question is proper.

The Court: Please read the question, Mr. Reporter.

(Last question read as above recorded.)

Mr. Kagey: Yes.

A. I have a judgment.

Q. What is your judgment?

A. That she could have. May I explain?

Q. Yes, I want you to explain.

A. I have already testified that she could have received enough mercury to have caused her death by the use of it as a mouthwash.

Q. Yes.

A. That is, in my opinion.

I do not know whether the Department of Justice agents saw me before or after I made the microscopic examination of the slides with Major Ash. They took a statement from me with reference to this material. Mr. Glass talked to me about the case but I do not remember when it was.

Recross Examination.

I said that she might have absorbed enough mercury through the mouthwash to kill her. There are deaths recorded from the vaginal application of a solution containing three and three-quarter grains. That is where the solution is in temporary contact with the mucous membrane. If she had from four to five pints used as a mouthwash she would have had eight or ten grains of mercury. I do not know how much of the mercury would be absorbed. I simply state, in the other cases, she had only three and three-quarter grains, and had been using it in the application to the vagina. I do not say what he gave her killed her but I think it might have. I do not want anybody to understand that I have formed an opinion as to how she got the mercury.

Q. If she spit it all out, and just washed her mouth and spit it out, four-fifths of it, it would not have that effect, would it?

A. It might.

Q. It might? Would it?

A. It has resulted in cases which are reported.

I have seen one report in which three and three-
392 quarters grains were used and death resulted but it was not used as a mouthwash.

Q. Possibly or not. Let me ask you: Dotor, taking a glass that contained a half-pint, or a pint, in two grains of mercury, two grains of mercury in it, there is no way anybody could get the two grains, without drinking all the liquor?

A. Not the full two grains.

Q. What?

A. Not the full two grains.

Q. If they spit three-fourths of it out, they would not get only one-fourth of it, would they?

A. Mercury, when it comes in contact with anything with which it might combine, more of the mercury might go out than would be if only part of the material was spit out.

I would not consider this treatment of Major Rose a bad treatment. There is danger in taking bichlorid of mercury but it is used frequently and the percentage of death is small. In all cases he did not know of any one that resulted from mouthwash.

Redirect Examination.

I saw the ulcers testified to by Major Mahon. The ulcer in the stomach that I saw was probably a month or less than six months old.

E. H. Bruns was called as a witness on behalf of the defendant and testified as follows:

I am a lieutenant-colonel in the Medical Corps of the United States Army and Chief of the Medical Service at the Fitzsimons General Hospital at Denver. I will be 52 years old next June. The government has between 1100 to 1300 patients in the Fitzsimons General Hospital at this time. I graduated from the Ohio Medical College in Cincinnati in 1903. I spent a year and a half interneship in Cincinnati general hospital and then entered the Army. I also attended the Army Medical School. From there I went to Sequoya National Park in California. I had several other stations in California, and was sent to the Philippine Islands. I was in the Philippine Islands two years and a half; then returned home by way of Europe, and took a course in tropical medicine in London. I returned to the United States, and took my examination for promotion, and was found to have tuberculosis. For that reason, I was sent to the United States Army General Hospital at Fort Baird, New Mexico, and was on duty
393 there nine years. That is a hospital for the treatment of tuberculosis. Then the World War came along. I was in Washington a year and a half, and went to France. After the Armistice, I was in Germany for approximately three years with the Army of Occupation. I was chief surgeon of the Army of Occupation. After that I had ten months

post graduate work in Switzerland, Germany and Austria. I spent most of that time visiting tuberculosis hospitals and sanatoria, and studying clinical pathology. I returned home and was placed on duty at the Fitzsimons General Hospital, as chief of the Medical Service and have been there ever since, except for two years spent in the Phillippines and six months spent in Vienna studying pathology. My specialty is tuberculosis, clinical medicine and clinical pathology. Fitzsimons is a general hospital but is used mostly for the treatment of tuberculosis. I knew Major Shepard at Fitzsimons when he was there from 1921 to 1922. I visited Major and Mrs. Shepard at their quarters. I remember one time when I was there during the visit of a mutual friend, I observed Mrs. Shepard's drinking. She had alcohol on her breath. After dinner I sat and talked with Mrs. Shepard and she left the room from time to time during the evening and when she came back her breath would smell very strongly of alcohol. I noticed it particularly because it was against the commanding officer's orders to have liquor on the post. No one else drank at that time and from my observation I would say that she was intoxicated.

Q. Did you ever hear any general talk there at the post, while she was there, about her habits of drinking; that is, was it a matter generally discussed?

Mr. Brewster: We object to that as incompetent and immaterial.

The Court: Sustained.

Mr. Kagey: Does your honor hold we may not prove the general reputation in that respect?

The Court: No, I do not think so; I do not believe it is competent.

Mr. Kagey: I believe it is.

The Court: I hardly think so.

Mr. Kagey: What is that?

The Court: I hardly think so.

Mr. Kagey: Note an exception.

Major Shepard was very devoted to his wife. There
394 were always flowers in the living room. She was always well dressed and in good taste and I never saw him treat her unkindly.

Q. Did you ever know of her wanting anything she did not get?

A. No.

Mr. Brewster: We object to that—wait just a moment, major. We object to that as asking for his opinion, and conclusion, assuming that he knew what she wanted and did not get, if anything.

Mr. Kagey: I think that is competent, perfectly competent in this case.

The Court: You are asking this witness what his opinion is.

Mr. Kagey: I said, "Did you ever know of her wanting anything she did not get?"

The Court: Of course, I might ask that of any person in this room, and of course, he would say "No." What is there to that question?

Mr. Kagey: To show their relations.

The Court: It might not show it at all.

Mr. Kagey: All right; we note an exception.

Major Shepard returned to Fitzsimons General Hospital about the early part of August, 1929, as a patient. He was brought there on a stretcher, seriously ill. I examined him after he got there and the clinical record showed that he had had a series of severe hemorrhages of the bowels and stomach and was very weak from the loss of blood. We gave him three blood transfusions. He did not make a complete recovery and we permitted him to go on sick leave in October, 1929. He was gone a month and then he returned.

Q. Had he any other ailment?

A. Yes.

Mr. Brewster: We object to this as immaterial; we cannot try this out.

The Court: Sustained.

Mr. Kagey: I do not know how we can try out lawsuit without evidence.

The Court: You may offer any material evidence that is competent here, and of course it will be received. You are taking up the time of the court with things that are not material to the issues in this case.

Mr. Kagey: We note an exception to the remarks of the court in the presence of the jury. If you will come up here, Mr. Brewster, I will tell you—

The Court: Let the record show the court asked counsel, a while ago, about the object of receiving this evidence, and counsel did not tell the court—(conference of court and counsel.)

(The jury retired.)

Mr. Kagey: Colonel Bruns.

The Court: I thought you were going ahead with this witness?

Mr. Kagey: I am; that is his name.

The Court: I thought you were calling someone else.

395 Mr. Kagey: Q. Colonel Bruns, with what other ailments, besides these duodenal ulcers and ailments you have testified about, was the defendant suffering during the Summer and Fall of 1929?

Mr. Brewster: Objected to as incompetent and immaterial; not tending to prove any issue in this case.

The Court: Sustained; unless it is shown to the court what issue in the case this might tend to prove.

Mr. Kagey: Note an exception.

Q. Colonel Bruns, I will ask you if the defendant was suffering with tuberculosis?

Mr. Brewster: Object to as incompetent,—

Mr. Kagey: Q.—at the time; that is, in the Summer and Fall of 1929?

A. Yes,—

Mr. Kagey: Just a moment; they want to object.

Mr. Brewster: Objected to as incompetent and immaterial; and not tending to prove any issue in the case, and leading and suggestive.

The Court: Sustained; and the court does not see the materiality of the evidence; and, unless there is some suggestion by counsel as to why the time of the court should be taken up listening to the evidence, the court must sustain it. Sustain the objection.

Mr. Kagey: Note an exception. Now, if your honor please, we thought, and still think, although the court does not agree with us and neither does counsel, that there was not a syllable of testimony with reference to these gifts that were given more than 30 days after the death of the defendant's wife; there was not a syllable of that evidence competent or admissible, but the court admitted it, and a great deal of it. Now, it does occur to us that a man who is suffering from the diseases that the major had, might be more able to feel the need of sympathy, to feel the need of wifely sympathy in this case, than a person who is strong, sound, healthy and perfectly normal. Now, I will confess that one reason why I think this evidence is competent is that this man, we expect

to show by this evidence, was a sick man. He had been charged in his actions in the matters that the court let the prosecution show, by the condition of health, to some extent, at least. Of course, we contended then, and we still contend, that has not got anything to do with the case, but it is in the record, the jury has heard it, and, if this would explain it, or tend to explain it in any way, then we believe it would be competent; but, we just want to make a showing on that, and, if the court does not agree with us, all we can do is save our exception. That is the way I feel.

Th Court: The court was of the opinion that this relationship between the defendant and Miss Brandon, which began, as I recall, seven months before the death of Mrs. Shepard, had no particular ending immediately upon her death, or within two weeks or any particular month succeeding it, but that the whole matter was just a continuation of a relationship existing between them, and, for that reason, was competent, and all a part of the same general arrangement, and, for that reason, admissible, and, unless there is some showing by the defendant that the defendant was affected in some way during the period covering this testimony offered here, the court is of the opinion it is incompetent.

Mr. Kagey: I will say to the court that we are not claiming the defendant was insane.

The Court: No; you do not claim his mind was affected, in any way—

Mr. Kagey: Only to the extent—

The Court: —and, under those circumstances, the court is of the opinion that the question is improper.

Mr. Kagey: Note our exception.

396 I specialize in clinical pathology and am chief medical officer of the hospital. I have had occasion to have under my observation quite a number of cases of mercuric poisoning. I have heard the testimony of the chemists as to the amount of mercury found in the viscera of Mrs. Shepard. I heard the testimony of Major Rose about the use of the bichlorid of mercury mouthwash for two weeks or more before her death.

Q. I will ask you, colonel, if, from your knowledge of the clinical pathology and of toxics and toxins, and other matters of that sort, generally, you have an opinion as to whether or not the mercury in the viscera of Mrs. Shepard

could have resulted from absorption of mercury in the mouth-wash used by her under the direction of Major Rose?

A. Yes, very probably.

Q. You think it is very probable. Cases of that sort have happened to your knowledge?

A. Yes—not from the mouth.

Q. Not from the mouth. Well, now, will you explain to the jury, in your own words, just how she could have been poisoned by that mouthwash, this poison having been found in her stomach as a result of that, just explain it.

A. Bichlorid of mercury is absorbed very readily, very easily, in the mucous membrance; that is, the membranes that line the mouth and other parts of the body. I have been told that is particularly true of the mouth. We recognize that, and are very careful about using certain drugs in mouthwashes, or gargles, because of the absorption of the drug, and, very often, some of these drugs affect the kidney. Now, for instance, last year, we had a case at our hospital that demonstrated this very well; the wife of one of the non-commissioned officers, who has a lot of children; we do not want anyone to use bichlorid of mercury as a preventative.

Mr. Brewster: Well, your honor, we object to that as purely not within the issues; we are talking about an absorption in the mouth, and not in the vagina.

Mr. Kagey: I understand that, the colonel is trying to explain it. I will ask a question that will make it competent.

The Court: Gentlemen of the jury, you will not consider the answer to this question, so far as it is given.

Mr. Kagey: Note an exception.

Q. You spoke of the membrane, or the mucous membrane: Is there a mucous membrance in the mouth?

A. Yes.

Q. Is that mucous membrane of the mouth sensitive, and constructed like the other mucous membranes?

A. Yes.

Q. In your judgment, would the action of mercury by absorption be similar to the absorption in other mucous membranes of the body?

A. Yes.

Q. Would that explain—

Mr. Kagey: I should like to have the witness to be allowed

to go ahead and explain the case that he was telling the jury about when the court interrupted him. It seems to me that is competent.

A. This woman—

Mr. Brewster: Objected to as incompetent, and immaterial.

The Court: I will let him answer.

Mr. Kagey: This woman took one vaginal douche of a type of bichlorid of mercury—

Mr. Brewster: Now, I object to that, unless he knows of his own knowledge what she took.

The Court: Did you give this treatment?

The Witness: I do not give douches.

The Court: If you know about it personally, why—

Mr. Kagey: Q. You treated the woman, colonel?

A. I treated her.

Q. You treated the case, did you, doctor?

397 A. I treated her.

Q. You treated the case, yes; you would not have to see it?

A. I have her clinical record.

Q. You have the clinical record?

A. Yes.

Q. Then you may testify to it.

A. She immediately developed symptoms, extreme symptoms of mercuric poisoning, and almost died. She had suppression of urine, she did not pass a drop of urine for three days; she had a mercuric stomatitis, she had all the clinical symptoms of mercuric poisoning. It looked as though she was going to die; she had hemorrhages from the bowels; she had hemorrhages from the mouth; but she finally recovered. That shows how readily—

Mr. Brewster: We object to this part of it.

The Court: Yes.

Mr. Kagey: Very well, you need not tell about that.

I know that many women can and do use mercury douches without apparent injury and it is a very common douche. It is customary to use a mercury solution in the treatment of Vincent's. I do not have an opinion as to the cause of this woman's death from the symptoms and evidence which has been related here on this witness stand.

Cross Examination.

It is very probable that she absorbed mercury from this bichlorid solution. That is the recognized treatment. It is the up-to-date treatment for Vincent's angina and is a solution that would be very probably absorbed in sufficient quantities to cause death. I did not say that it probably produces death. I think the death was caused by taking the solution of bichlorid in the mouthwash. That is the probable way and the reasonable way she got the mercury I think. That is my belief, because it can be absorbed very easily through mucous membranes. If given the tablets she could have of course died of mercury poisoning. If some of it had been mixed in liquor and given to her she naturally would have died of mercury poisoning. I just say this because this mercury is what I heard mentioned. I do not think it was Dr. Rose's treatment that probably killed her. Dr. Rose did not kill her. I do not know who killed her. I do not know what killed her. If one takes mouthwash, one cannot tell how much she is going to swallow; one does not get all the solution out of the mouth. The only indication that she died of mercuric poisoning was that taken through the mouth wall. That is my opinion from the evidence. That is the only evidence I have heard so far. I am the Colonel Bruns spoken of in Major Shepard's letters to Grace Brandon.

Q. You do not know, you do not attach any im-
398 portance to the government's evidence about what happened?

A. I have not yet heard anything important.

Q. You have not?

A. No.

Q. You attach no importance to the things that happened between this woman and Shepard?

A. That is natural; that is perfectly natural.

Q. That is natural with you?

A. Yes, sir.

Q. You attach no importance to the fact that he refused an autopsy?

A. That is perfectly natural; I understand that perfectly.

Q. You attach no importance to the fact that, while his wife was dying, he was sending presents to another waman?

Mr. Kagey: The witness has not testified to anything of

this sort; and counsel knows perfectly well this is not proper cross examination,—

Mr. Brewster: I think it is.

Mr. Kagey: —and I object to it on that ground; and I think it is highly prejudicial. It assumes a lot of facts not only not in evidence but not true, and counsel well knows it.

Mr. Brewster: Why, your honor, this witness testifies—

Mr. Kagey: I think it is prejudicial, and inquiring of the witness about a matter about which he has not testified.

The Court: I think this witness has been here all the time, and heard all of this evidence.

Mr. Kagey: But he may not be cross-examined except about matters concerning which he was examined in chief, may he?

The Court: Why, yes.

Mr. Kagey: All right; just note our exception.

The Court: It might test the credibility of the witness.

Mr. Kagey: Does your honor say that an argument of this sort would test his credibility as a witness?

The Court: I do not know about this particular question. You might read the particular question, Mr. Reporter, if you can find it readily; otherwise, we will start all over again.

Mr. Brewster: We will start over. This witness testified from the evidence in this case—

The Court: Yes.

Mr. Brewster: —I asked him, and he said he found nothing except this one thing.

The Court: Yes.

Mr. Brewster: I have a right to ask him what he attaches to the other testimony.

The Court: I will allow that.

Mr. Brewster: Q. You attach no importance to the fact that, while his wife was dying, he was sending flowers to this girl?

A. I did not know if he was.

Q. You heard the testimony?

A. I did not know when he sent the flowers.

Q. If he sent flowers on May 20—

Mr. Kagey: We object to that, for the reason that this is not in evidence; at the time they intriduced it, it was a letter written May 7 or 8, and his wife was not dying at that time.

The Court: May 20; is that right?

Mr. Brewster: Decoration Day flowers.

Mr. Kagey: If the court please, we object to that for the reason that the Decoration Day flowers were ordered before May 10, and that was their own evidence.

The Court: Well,—

Mr. Kagey: That is their evidence.

The Court: I am not sure.

Mr. Kagey: I am sure of it.

The Court: Well, go ahead.

Mr. Brewster: Q. Now, you attach no importance to that fact, do you?

A. No.

Q. You attach no importance to the fact that this man was writing this woman before?

A. No.

Q. None whatever?

399 A. Nothing.

Q. That is your code of morals, and your idea of duty?

Mr. Kagey: Wait a moment; wait a moment; if the court please, we ask that counsel be reprimanded for asking such a question on cross examination. It is not proper cross examination.

Mr. Brewster: I withdraw it.

The Court: He withdraws it.

Mr. Kagey: The gentleman withdraws it, but that does not cure the evil. I think the jury should be instructed to disregard insinuations of that sort.

The Court: Proceed.

Mr. Kagey: Note an exception.

Mr. Brewster: Q. You attach no importance to the fact that he pledged his love to this girl in November, before his wife died?

A. None at all.

Q. You say that that is perfectly natural, and all right?

A. In the circumstances.

Q. You testified that Major Shepard, if I understood, loved his wife dearly, were your words—what?

A. That was ten years ago.

Q. You have not seen him since he came there, and you testified he loved her then, did you not?

A. I testified, at that time, he was devoted to his wife.

Mr. Brewster: And you attach no importance to this other matter. That is all.

Redirect Examination.

By Mr. Kagey: Q. Doctor, assuming that this woman became a dope fiend and a dipsomaniac—

Mr. Brewster: We object to that as no proof that she became a dope fiend.

Mr. Kagey: There will be proof.

Mr. Brewster: Produce it.

Mr. Kagey: There will be.

The Court: Well, I have not heard any evidence.

Mr. Kagey: There will be.

Q. Assuming that she became a dipsomaniac, assuming that she told her friends that she did not care for the major, assuming that she told her grandmother that she wanted to die, that the bootleg liquor was killing her, making her sick; assuming that she told the physicians who came to treat her, and who gave her this mouth wash, that she did not want to get well, that she wanted to die; assuming that she told a number of Army officers and their wives that she was going to bump herself off; assuming that she told them that; that she bought liquor by the gallon and the five-gallon lots, bootleg liquor, and was using it constantly: Would you say, in those circumstances, doctor, that the probability was that she killed herself, or that somebody killed her?

A. She killed herself.

Mr. Brewster: Wait a moment—

The Court: Doctor—

Mr. Brewster: You are a little bit too eager.

Mr. Kagey: Some of this evidence is not in.

The Court: The objection is sustained.

Mr. Brewster: We ask the court to instruct the jury—

The Court: Gentlemen of the jury, you will not consider that question, or the inferences suggested in the question, because the evidence on many elements have not been introduced here.

Mr. Kagey: At this time—

The Court: You may ask some questions, if you desire.

Mr. Kagey: Will your honor permit me to note an exception? That is what I wanted to do.

The Court: All right; all you have to do is say "Exception", to do that; you do not have to make a speech.

Mr. Kagey: If your honor please, one other matter I

wanted to call all attention to; perhaps this question did include some things not in evidence—

The Court: You know it did, do you not?

Mr. Kagey: We will connect it up.

The Court: You will have to do that.

Mr. Kagey: I will say, in good faith, we will do that.

The Court: Your question was, in some parts, very unfair; I think you better connect up your evidence first.

Mr. Kagey: We think the question is just as fair as the question that prompted it. Perhaps they are both unfair. We will put it that way. We will promise to connect this up.

The Court: You will not consider those inferences suggested, gentlemen of the jury.

Mr. Kagey: We will recall this witness after we have offered this testimony.

Mr. Brewster: That is all.

Mr. Kagey: You may cross-examine.

The Court: Is there any further cross examination?

Mr. Brewster: No.

The Court: That is all.

Mr. Kagey: Major St. Peter.

The Court: Can you call another? He does not seem to be here.

Mr. Kagey: Yes, he is here.

The Court: Why does he not—

M. A. St. Peter was called as a witness on behalf of the defendant and testified as follows:

My name is M. A. St. Peter. I am a Major in the Medical Corps of the United States Army. I have been in the Army since 1917, and am a regular physician, just a doctor. I graduated from the University of Pittsburg. I graduated in 1910 and have been practicing medicine ever since. I knew Major and Mrs. Shepard when they were at Omaha. I knew them there from June, 1927, until about September 1, 1928. I knew them there very well. We made the ordinary social calls upon them until in February or March, Major Shepard became ill and I took care of him. It was central pneumonia of the left lung. He was in bed about a month and had two or three months sick leave after that.

Mrs. Shepard was there while he was ill and I became very well acquainted with her. She told me she drank intoxicating liquors. She told me she was very unhappy, and when it seemed that she could not stand it any longer, she would take some liquor and go to bed and stay there for a day, or possibly two days. I knew her to have periods of depression very frequently. She told me she took liquor to counteract these depressions. She carried her liquor extremely well. I never saw her when I thought she was under the influence of liquor. I had a talk with her in which she mentioned taking her own life. It was during the time Major Shepard was ill. She said that she frequently got so disgusted with life that she saw no reason for carrying on, and intended to kill herself. That is perhaps not the exact words, but as nearly as I can recall. That was in February or March of 1928. She talked to me about her feeling for Major Shepard. She said she had married Major Shepard
because she thought he was comparatively rich; that
401 she was extremely disappointed when she found he
was not; that they had very little in common, and that she cared nothing for him. She said she had considered getting a divorce, but Major Shepard was not financially in a position to pay her alimony, so she had to give up the idea. Mr. Glass, the government agent interviewed me in December of last year but I was not subpoenaed to appear before the grand jury at Topeka in April and I was not subpoenaed by the government to appear here.

Cross examination: I know nothing about her life before she came to Fort Omaha. She said she was a young woman and the major was kind of an old man, and she did not get sexual gratification.

Q. What did you advise her.

A. I told her in the circumstances she might be meeting somebody else.

Q. While they were married?

A. Sir?

Q. Even while they were married?

A. Yes.

Max Weinberg was called as a witness on behalf of the defendant and testified as follows: I recently retired from the Army and am stopping at Fort Leavenworth. I am a Major. I was in the service of the United States Army for

more than thirty years and retired August 3, 1930. I knew Major Shepard and first met him in 1922 in Manila. I knew Mrs. Shepard. I met her in the latter part of 1922 in Manila. The major was on duty at Sternberg General Hospital, where I was on duty at the time near Manila. I first met Mrs. Shepard when we made our social call in November or December, 1922. When Major Shepard arrived in Manila with Mrs. Shepard I met the steamer they came on. Mrs. Shepard's mother was with them but she did not leave the boat. I performed practically all the administrative work in the general hospital, and had charge of the post exchange. Mrs. Shepard came there frequently to buy toilet articles, etc. I noticed her on several occasions, probably seven or eight times, while visiting the post exchange, she would be under the influence of liquor; she came in my office, and I detected the odor of liquor on her breath. When she noticed I noticed it, she went into the store and bought some life-savers; she bought them by the dozen packages. That was during the first part of 1923. I do not know if one would call it intoxicated, but she was under the influence of liquor. I think when a person takes one glass of liquor they are under the influence of it. I had met Mrs. Shepard when she was
402 sober, and in my opinion, she was very pleasant and charming and happy at those times, and when I knew she was under the influence of liquor, her eyes were bloodshot, she looked pale and complained about headaches, and on several occasions I noticed she had sores on her mouth, I mean on the outside of her lips, and she was more talkative than when she was sober. I believe Mrs. Shepard tried to find out from me how she could obtain liquor in Manila at wholesale prices. We met at the park on the waterfront where band concerts were held, and I met Mrs. Shepard probably 25 or 30 times on those occasions. I always went up to their car and greeted them, and on many occasions I detected the odor of liquor in the car. I met her probably five or six times on social occasions in Manila at parties and dinners where drinks were served. I never saw Mrs. Shepard refuse a drink; they served probably two or three or four cocktails before dinner. Mrs. Shepard came into the post exchange one morning, and told me she would like to know whether she could purchase liquor at wholesale prices through the post exchange, but she said she did not want me to speak to Major Shepard about this, because Major Shepard did not approve

of having liquor in large quantities in his house. I told her we were not authorized to sell liquor, or negotiate any sale for liquor, but I told her where she could get it at wholesale prices in Manila. I met the Shepards later in Omaha; the Major probably in November, 1924, and I met Mrs. Shepard probably two or three weeks later. We were stationed there together for approximately two years, and during that time we saw Major and Mrs. Shepard as often as four or five times a week and at other times once or twice a week. I saw her under the influence of liquor many times when I met her in Omaha. We met every Sunday, we went to a show every Sunday. That is Major and Mrs. Shepard, Mrs. Weinberg and myself. I would say she was under the influence of liquor every time she went to the show. When she was under the influence of liquor, she lost weight; she did not eat much and was very much depressed. She talked differently when she was under the influence of liquor than when
403 she was sober. Her eyes were bloodshot. She had periods of depression, very depressive and I saw her cry three or four times. I went to Fort Omaha one day while Major Shepard was treating a niece of mine, and I went to Major Shepard's house. I found Mrs. Shepard in a very depressed condition, her eyes were bloodshot, and I asked her what the trouble was and she said that she was not feeling well, and she was afraid she would become in the same condition as her mother is in now, and she would much rather be dead than alive if she knew that would be so. I tried to cheer her up. I told her she ought to stop her drinking if Major Shepard did not approve of it, and she said she could not. She always spoke very highly of Major Shepard. She said he would give her anything she asked for, and that he did all he could for her. He bought her a Buick car before she came to Omaha. She said that. At the times we observed Mrs. Shepard intoxicated both at Manila and Omaha, Major Shepard was very much embarrassed and he tried to hide it.

Q. Did he try to get her out of the company of people when she was intoxicated?

A. I have never seen him try to do that.

Cross Examination.

By Mr. Brewster: Q. Let me see if I understand you rightly: You say, every Sunday, when you were in Omaha, you used to go to the picture show?

A. For a while, not during the entire time.

The Major went along. I went along. My wife went along. The Major's wife went along.

Q. How did Mrs. Shepard look at those times, when she was drinking?

A. She was depressed. Her eyes were bloodshot. Smelled liquor on her breath.

Q. Smelled liquor on her breath. What else? Did the Major try to conceal it; is that right?

A. Yes.

Q. And took her to the picture show?

A. I beg your pardon?

Q. And you all went to the picture show?

A. To a picture show.

Q. You say that, every Sunday, when she was drunk, they would take her to the picture show?

A. I did not say a picture show: I said show. We went to the Orpheum.

Q. And he was trying to conceal it?

A. To go to the Orpheum?

404 Q. He tried to conceal this intoxicated conditions?

A. I did not say he tried to conceal it there; I said he tried to conceal it when we were at dinners and in company.

Q. You went into a show, did you not?

A. We went into a show.

Q. You did not say a word about company when Mr. Class asked you the question; did you, when you told him it would be better if you said so-and-so; did you say anything about a company at that time?

A. I do not know which company you refer to.

Q. I know; but you testified that this woman was bleary-eyed, bloodshot and depressed, and you would all go off to a show together?

A. I said every time she was drinking, her eyes—

Q. You said, every Sunday, when you went to a show—

Mr. Class: Let the witness answer the question.

Mr. Brewster: Q. Did you not say you could not recollect a Sunday when you went to a picture show that she was not under the influence of intoxicating liquor?

A. I did not say she was always under the influence of intoxicating liquor.

Q. Did you not say—

Mr. Class: Let him answer the question.

Mr. Brewster: Q. Did you not say you could not recollect a Sunday when she was not under the influence of liquor?

A. That is correct.

Q. Yes; you could not recollect a Sunday—it was Sundays, when you went to the picture show?

A. Exactly; we went during the week, too.

Q. Then, every time you went to the picture show, she was intoxicated?

A. Under the influence of liquor.

Q. Her eyes were bleary?

A. Bloodshot.

Q. And she was depressed?

A. All right.

Q. What did she say to you?

A. Oh, just a general line of talk.

Q. How did the major try to conceal her condition those Sundays?

A. I think the major tried to take her out of this depressed mood, and took her to the show.

Q. He took her to the show, looking as you say she did?

A. Oh, there were other people that looked the same.

Q. Oh, there were—what?

A. Exactly.

Q. There were other drunk people there, you mean?

A. Not drunk, but people that had been drinking.

Q. A lot of people that looked just exactly like she did?

A. Not a lot of them; not a lot of them.

Q. How many people would you say?

A. I could not tell.

Q. Give some idea?

A. I could not tell.

Q. You say there were other people?

A. You know there are lots of drinking in this country, and I could not say how many are drinking.

Q. You say you saw other people at that show that looked like she did; now, how many?

Mr. Class: This is immaterial, and it is a quibble and a quarrel between the district attorney and this witness, as to how many people he saw.

The Court: All right, sit down. Proceed.

Mr. Class: Is my objection overruled?

The Court: Yes. The court does not consider it a quibble.

Mr. Class: The question was, how many people he saw.

It is immaterial how many people he saw under the influence of liquor in some show in Omaha.

The Court: Probably a good many, or some proportion.

The Witness: There were not a good many; there were a few.

Mr. Class: Save an exception.

Mr. Brewster: Q. Enough to attract your attention?

405 A. I beg your pardon?

Q. Enough to attract your attention?

A. No, no; I happened to notice that one or two, on several days, went to the show under the influence of liquor.

Q. I did not understand. You noticed what?

A. That one or two people were in that show every Sunday under the influence of liquor.

Q. That is what you meant by the first answer, that there were others there like her?

A. But there may have been more.

Q. Did you see her drink socially, you say?

A. I did.

Q. You never saw her refuse? Well, name some of these people, at parties, in Omaha, where she drank and did not refuse liquor?

A. I did not say liquor; I did not say liquor was served in Omaha.

Q. You were asked, and you said you did not see her refuse it.

A. I told you, at parties, in Manila, where liquor was authorized to be served, where I saw her drink, was my answer.

Q. I may have misunderstood you, but did you not say, at Omaha, you never saw her refuse it?

A. No, sir, I did not say that.

Q. Did you ever see her drink at a social gathering in Omaha?

A. At social gatherings?

Q. Yes.

A. No, sir.

Q. You only saw her drink secretly?

A. Secretly, at the house.

Q. You were there when she drank secretly?

A. I was there.

Q. She drank right before you?

A. She was there.

Q. Who else was there?

A. I did not see her take any drink, she went out of the room, as a rule, and came back, and I smelled liquor on her breath.

I say that anybody that touches liquor is under the influence of it. I did not say intoxicated. I do not know who is in the United States now that saw her drink. Some people drink at the parties in Manila and some did not.

Q. In other words, you saw her at Manila, accepting cocktails, when they were given?

A. Yes.

It was not against the law to drink or purchase liquor in Manila. When I saw her in 1923 I would not think she appeared any different than she appeared in Omaha in 1924. I saw her in 1926. I think she was gradually going down hill, rather losing weight and loss of appetite. I think I last saw her in July or August, 1926. I should say she was gradually going down hill.

Q. What progress had been made; in what way did she change?

A. She became more depressed.

She was more depressed, than when I first met her. I believe I said I saw her in a depressed condition every time she was under the influence of liquor; that was more than once; I saw her many times under the influence of
406 liquor. When she drank, that depressed her; that did not exhilarate her. I have not associated with intoxicants very much during my life; I do not know what their condition is when they are under the influence of liquor. The Shepards and us were not any more intimate friends than usual. I saw her drink socially at parties at Manila
407 where liquor was authorized to be served. I did not say I saw her drink at social gatherings in Omaha. I saw her drink secretly at her home in Omaha. I did not see her take any drink, she went out of the room as a rule, and came back, and I smelled liquor on her breath. I do not drink. I never drink. Some of the other people drank at the parties and some did not. It was not against the law to drink in Manila or purchase liquor in Manila. When I saw her in 1923 I would not think she appeared any different than she appeared in Omaha in 1924. I saw her in 1926. I think she was gradually going downhill, losing weight, and loss of appetite. I did not see her after I left Omaha in

1926. I think it was in July or August, 1926. She was going downhill gradually. She was more depressed than when I first met her. She was I believe in a depressed condition every time she was under the influence of liquor. I saw her many times under the influence of liquor. I have not associated with intoxicants very much during my life and I do not know what their condition is when they are under the influence of liquor. We and the Shepards were not more intimate friends than usual.

William W. Southard was called as a witness on behalf of the defendant and testified as follows:

I am 44 years of age. I am a Major in the Medical Corps, and have been in the United States Army since June 10, 1917. I became a physician in 1916, and have been in the Army ever since I finished by interneship. I graduated from John Hopkins in general medicine. I am just a doctor. I entered the Army in the Army Medical School upon graduation. That is at Washington. Upon graduation from the Army Medical School, I was kept as assistant adjutant for two years. From there I went to Fitzsimons General Hospital, Denver, Colorado, where I remained from 1919 until 1922. I have served both in administrative and professional capacities. In 1922, that is, in July, I left for the Philippine Islands, sailing from San Francisco the early part of August, 1922, where I was for two years as adjutant of the hospital, which is an administrative position, and was ordered back to Fort
408 Sam Houston, where I was stationed at the station hospital, I have served from that time, which was November 3, 1924, to the present time at that hospital. During that time, I have served both in administrative and professional capacities. I first met Major Shepard at Fitzsimons General Hospital in 1920 or 1921. We were both married and our wives were there. I was not acquainted with Mrs. Shepard at that time but I met her in San Francisco while we were waiting for the transport. We went over on the same boat. Mrs. Shepard returned to the United States on the same boat with her mother, after which she returned to the Philippines. She must have come back to the Philippines in November or December, 1922. I knew them very well over there. I would see her two or three times, some weeks three

or four times, and I think there was a period of two or three weeks I did not see her at all when I was up in the mountains, but while I was in the city of Manila I saw her rather frequently. She went to China with my wife on a tour and I accompanied them to the boat. They were gone about a month. I saw a good deal of Mrs. Shepard after she came back from the States perhaps two or three times a week. We were intimate friends. A great many times Mrs. Shepard had the breath of alcohol. This kept up for some time. Mrs. Shepard was a woman of moods; I mean she was a woman with frequent transient changes of personality. I would see her at times when I thought she was normal, that is here behavior and conduct in life was exactly the same as the average individual. She was very charming and lovely at those times. She had other moods of depression. By depression I mean she had moods where she was less communicative than usual and instead of walking around in her usual style, she was apt to drop the whole head a little bit lower, and she was very hard at those times to interest in conversation. The lines on her face were changed, and when she was depressed it was difficult to engage her interest. These moods were very frequent. I mean by that maybe once one week, maybe skip a week or two, maybe two or three in succession, they were irregular, but they were there. A mood that I
409 saw her in less frequently was a mood of gaiety. I do not mean extreme gaiety, because Mrs. Shepard naturally was a reserved woman. She had another mood I had not seen her often in, but that was a mood brought on because it was accompanied by drunkenness of a great degree. She was on the point of stupor. She did not expect this call, when I saw her, Mrs. *Shepard* and I went in unannounced. I was standing by the bedroom, and I looked in, and she was lying in bed.

"It is hard to describe her eyes, unless I may use an old expression, that they looked very far-away; they looked as though they had a scum over them. The lines of her face had completely changed; in fact the lines of expression were gone. The thing that struck me the most, and I still remember it, her lower jaw had a way of—her lower jaw had a was of shaking and distorting the expression, and in those conditions, she was not a beautiful woman. I have seen her in those conditions at least twice."

I did not go into the room but the odor of alcohol was very, very nauseating to me. The room was pervaded with it. I saw her those two times in my official capacity. I did not indulge in very much discussion of the case with other officers. I received any official communication about her drinking from my commanding officer. We left the Philippines at the same time and on the same boat. I do not recall smelling any alcohol coming back on the boat. I went to Los Angeles and they were ordered to Omaha. The last time I saw her was when they left San Francisco for Omaha.

Cross Examination.

The Major spoke to me about getting transferred to San Antonio. I do not know that a good many women that went to the Philippines from the United States became depressed. I was not familiar enough with many people to answer that question. I happened to be an intimate friend of the Shepards, and know about her case; but I certainly was not intimate enough to know about the other officers' wives. She drank at parties in public. I drank some when liquor was offered. Most of the other women drank. At parties, we would take maybe two or three or four drinks. A party of four went to China and my wife went with Mrs. Shepard. They got back in about a month. I said I saw Mrs. Shepard in a drunken stupor at least twice in the Philippines.

Charles A. Shepard, the defendant herein, called as
410 a witness on his own behalf, testified as follows:

My name is C. A. Shepard. I am 59 years of age. I was born in Belleville, Canada. I am a medical officer in the United States Army with the rank of Major. I have been a physician since 1896. I graduated from the University of Buffalo in 1896. I practiced in the central part of New York state about five years. After that in California until about 1912 or 1913 but during part of that time I was doing special work: tuberculosis. I went into the United States Army in 1917 as contract surgeon for about six weeks. I was on the tuberculosis board at Camp Kearney, California. I then went back to the sanitorium that I was in charge of in California, at Sierra Madre. I was there about a year. In the spring of 1918 I received a commission in the Reserve of the United

States Army Medical Corps and was ordered to Camp Kearney again. In 1920, I was transferred to Fitzsimons General Hospital where most of the cases are tuberculosis and they treat ex-service men and soldiers. I was transferred from Fitzsimons in August, 1922, to the Philippines. I was on duty there for two years, and returned in 1924, and was then sent to Fort Omaha, Nebraska, was on duty there four years, and then transferred to Fort Riley. Prior to this order for transfer, I had received orders to take the course at the school of aviation medicine, Brooks Field. I reported at Fort Riley the latter part of August, and was there only a few days. I went to Brooks Field, and took the three-months course, and returned to Fort Riley December 6 or 7, 1928. I was on duty at Fort Riley until the latter part of July, 1929, when I was taken ill and transferred, as a patient, to Fitzsimons General Hospital. I was placed on a duty status about December 8, duty officer at Fitzsimons. I have been there ever since. I was taken into custody on March 17, 1930, and was released on bail I think about 5 weeks afterward; I think it was April 26th. Ever since I have been released on bail I have been on duty at Fitzsimons General Hospital. I married Zenana Shepard in 1916 and had known her only a short time. She was a
411 nurse on duty at the sanitorium of which I had charge for several months. We took a honeymoon trip by driving to San Diego. The morning after we arrived there I noticed Mrs. Shepard had been drinking. I noticed it from the odor on her breath; I asked her about it and she acknowledged it, and in going into the bathroom—I found several empty flasks. After the honeymoon we went back to the sanitorium for a few days and I closed out my interest in the sanitorium and returned to Needles. I was on duty there until the spring of 1917, when I returned to Camp Kearney. I noticed she was drinking at times at Needles. She would go for weeks at a time with no odor of liquor on her breath and with no symptoms of having been drinking. I found many bottles, many empty bottles in the cupboard. My daughter was living with me at the time, and when I asked her about the bottles she said they belonged to my daughter. I was stationed at Whipple Barracks, Prescott, Arizona, for a time. I know the mother of Mrs. Shepard. She came to visit us at Whipple Barracks while Mrs. Shepard was sick with the influenza, and remained for two or three days. Mrs. Shepard was there until I was transferred to another station. I did

not observe much drinking at Whipple Barracks, not nearly so much as I had observed at Needles. Her mother did not accompany us to Fitzsimons General Hospital but came later. I think it was the following spring. Her mother had been released on probation and Mrs. Shepard went to Los Angeles and brought her out to live with us.

Q. By "probation", what do you mean?

A. She—

Mr. Brewster: We object to this, and ask that the answer be stricken out as hearsay.

The Court: Yes.

Mr. Class: Q. What was the mental condition of Mrs. Shepard'd mother while you were living at Fitzsimons, and also while you were living at Whipple?

Mr. Brewster: Objected to as incompetent and immaterial.

The Court: Sustained.

Mr. Class: If the court please, any relations this witness had with either Zenana or her mother, intimate relationship, may have some bearing on the situation as affects this case.

The Court: Oh, not a relationship with the mother back that far. That would not have any tendency to prove any issue in this case.

Mr. Class: Save an exception.

While we were living at Fitzsimons she drank more heavily at some times than others and was very depressed. She had been drinking one afternoon, and I had scolded her for
412 it because Doctor Browning and Colonel Bruns were coming for dinner and I was afraid they would notice it. She said she had not taken much. We left Fitzsimons in July, 1922, and drove to San Francisco. Mrs. Shepard's mother went with us. Her mother accompanied us on the transport to Manila. On the way over she became violently insane. When we got to Manila she had to return to the United States and Mrs. Shepard had to accompany her back. Mrs. Shepard then returned to the Philippines and we set up housekeeping in Manila. I was stationed at Sternberg General Hospital, but I was assigned to a civil board to survey the troops for tuberculosis, and I was all over the islands. That survey took a little over 6 months. Mrs. Shepard did not accompany me except to the Southern Islands which was for 11 or 12 days. We lived about a mile from the hospital. Mrs. Shepard drank a great deal in the islands, so much so that I was always afraid it would be found out. I spoke to her about

it many times. I scolded her at times, and other times I tried to show her what it was going to lead into. She replied she could not help it. She went to China in the fall of 1923 and was gone about a month. Mrs. Southard, Mrs. Grant and Captain Grant accompanied her. After her return to the Philippines we remained there until August or September, 1924, when the transport sailed. There were several times in the Philippines when we were in Manila that she was so under the influence of liquor that she would have to break her social engagements and would remain in bed. On one occasion she had to go to a hospital. She had a spell of several days, where she was in a stuporous condition from the effect of—. As nearly as I can recall it was in the spring of 1924. I cannot tell exactly. I had a talk with her and told her that I could not take care of her because of my duties, that I would have to be away from her during that time and it was absolutely necessary for her to go to the hospital, where she could have proper treatment. I even called the ambulance, and as it backed up to the door she absolutely refused to go. There was a Filipino boy by the name
413 of Cenon Manalotto, who was my houseboy. She did not go to the hospital and never went to it while she was in Manila. After Mrs. Shepard recovered from this spell I got a month's leave and took her up to Baguio, a mountain resort in the Philippines, established by the United States Government for the recreation of Army officers and their families to get away from the climate at Manila. This was in the month of May, 1924, as nearly as I can recall. As we drove on to the Reservation, Mrs. Shepard threw something out of the car. I heard glass breaking, and I asked her what it was, and she said, "Oh, it is only a bottle." I said, "you cannot throw things on a roadway on a Reservation, that way." I got out and picked up the bottle; it was wrapped in a towel, there was still some liquid in the bottle. It was gin and orange juice mixed together. I saw liquor in the house at Manila, and I do not know as I directly saw it delivered to her. We were stopping at the Windsor Hotel at Manila, while our goods were being packed to return to the States. I noticed she was drinking heavily again. I asked her about it and she denied it, but I caught this boy bringing bottles of gin and orange juice to our rooms. I wrote to Curtis McCoskey, my wife's brother, with respect to Mrs. Shepard's drinking and that it was undermining her health.

That she was always afraid she was going to be like her mother following these drinking spells, and asked him if he knew of anything that I could do. We left Manila for the States around the first of September, 1924, and arrived at San Francisco about October 1st. We stayed in California a few days. Mrs. Shepard remained there, and I went to Toronto, Canada, where I had a brother and other relatives. I went from there to Fort Omaha and arrived there about November 1st. I knew Major and Mrs. Weinberg in the Philippines. I knew Major and Mrs. Southard at Fitzsimons and they accompanied me to Manila and from Manila back to the States. Mrs. Shepard came to Fort Omaha several weeks after I did and we then set up housekeeping. We lived in Omaha approximately four years. Her use of in-
414 toxicants while in Omaha was practically the same as I described. There were periods when she would not touch anything at all, and then there were periods where she would drink a little and periods where she drank to excess. Prior to going to Fort Riley in the spring of 1928, Mrs. Shepard accompanied me to Toronto and we were there about two months. She drank some while we were there but not to excess as she usually did not drink to excess where I was with her all the time. After our return from Toronto we gave up our quarters at Omaha and lived in a hotel about a month before going to Fort Riley. I knew Major St. Peter and Mrs. Allen. We arrived at Fort Riley the latter part of August but I was only there a few days as I had to report at Brooks Field at San Antonio. I was there to qualify as a flight surgeon and spent about three months. I received a certificate entitling me to an appointment as a flight surgeon and I have the certificate now. I arrived at Fort Riley from Brooks Field about December 8th. I tried to get transferred to San Antonio or to the Flying Corps while I was at Brooks Field and wrote a letter to the chief medical officer of the Air Corps in Washington requesting an assignment. I advised Mrs. Shepard of the efforts I was making to be transferred to Brooks Field or to the Air Corps while I was in San Antonio and received a telegram in reply. She told me to get it by all means, that she would take care of everything at that end. I was not successful in making the exchange. Mrs. Shepard's general appearance was always good except when she was drinking to excess. She always took immaculate care of herself. The building at Fort Riley was not fully

completed, so she attended to the establishing of our home after I left there. When I left for Brooks Field her general condition was good. I corresponded with her at regular intervals while I was at Brooks Field and she wrote letters to me. Upon my return I arrived at Junction City sometime in the late afternoon. Mrs. Shepard did not meet me immediately upon my arrival. Probably 20 minutes afterwards she appeared and said she went to the wrong station. She had been drinking. We drove home. Her general appearance had changed and I was extremely shocked. She was very,
415 very weak, very nervous and depressed, would cry at very frequent intervals, was irritable and would take offense upon the slightest provocation, and at times was very hysterical. She had lost a lot of weight. She had no appetite. I asked her if she remembered the promise she had made when I left in regard to her drinking. She said she did, but she simply could not help it—it got beyond her. She had promised me she would not drink liquor of any kind, except beer. She cried and said she would—if I would assure her that she was not going to be like her mother, she would make another stand and try and overcome it. I told her if she stopped her drinking she would not be like her mother, and I would do all I could to help her. At that time I wrote Curtis McCoskey of her condition, telling him what condition I found his sister in when I came back. He sent a wire but I did not receive it. I saw it. When I came home Mrs. Shepard was crying, and met me at the door with this telegram in her hand. She asked me if I had written to the boys about her condition and I said I had. She asked me why I did that, that she did not want them to know, and I told her that the time had come when something had to be done, that she could not live and go on this way. She again told me if I would assure her that she was not going to be like her mother that she would try and overcome it, and she asked me if I would consent to taking a cocktail three times a day with her, that she would limit herself to that and I agreed to do it. I did for a while but found that she was drinking in the evenings when I was out, and because of my stomach condition I had to stop it. After my return to Fort Riley in December, 1928, she had periods when she was practically normal. She would go out some, but she preferred to drive the car more than she did to go to social functions. She remained up very little at night

after I would go to bed—we occupied separate rooms—and I would frequently hear her vomiting. I got up many times and asked her what was the trouble, what she had been doing; and I could see that she had been drinking, and I considered the vomiting due to that. She said several
416 times I was finding too much fault with her about drinking. In the spring, about May 1st, she had improved in health but she had no appetite and she was very nervous and hysterical. I never saw anybody that could carry their liquor and show less effect of it than Mrs. Shepard could. While I was at Fort Riley I had whiskey in my kit. Several times I noticed that after a bottle had been filled that it would be necessary for me to procure it for a patient and I would find the bottle empty. The whiskey was post prescription whiskey. In my kit I carried my stethoscope, some ear specula, a knife, forceps; hypodermic syringe, containing narcotics and stimulants; ordinary medicines, like aspirin, calomel, and so on, and bottles of medicines that I would use for local treatments; argyrol, mercurochrome and things of that kind; applicators. I carried some sedatives: luminol, or amatol, morphin, codein and things of that nature. I carried antiseptics. I carried mercury for use in disinfecting my hands and creosole—I do not recall right now any other preparations. I found Mrs. Shepard at my satchel one day; I always brought my satchel in from the car. It was right after lunch. It was a week or ten days after I returned from Brooks Field. There was a swinging door between the dining room and the kitchen, and I opened the door to go into the kitchen; my satchel was lying on top of the icebox, where I laid it when I came in. Mrs. Shepard had a box in her hand, and was taking a tablet or some tablets out of the box. I asked her what she was doing, and she told me then what she had been doing. She said she was taking a dose of morphin. She said she had been taking it for some time; that she had intense headaches, and so much pain she had to have something to kill it. I told her that in conjunction with the alcohol that these tablets were going to kill her; that they were undermining her health, and there was not anybody who could stand that and live. (Crying.) I took the box away from her. When Mrs. Shepard was using intoxicating liquors during our married life generally, she would have marked periods of depression and remorse. She would become hysterical and cry and promise that she would not do

it again if I would assure her she could get away from
417 it. She would shut herself up, got to bed and stay there for a day or two at a time—she tried hard to fight it. I always tried to conceal it from everybody; that is, times when she would go to bed and shut herself up, I always said she had flu or was nervous, or something of that nature to try and keep anybody from knowing it. (Here the witness identified defendant's Exhibit LL, which *which* exhibit was a statement from the California Vineyards Company, Chicago, Illinois, dated May 20, 1929, for five gallons of Muscatel Type X Sweet Wine, white type, $18.50. I had a conversation with Mrs. Shepard about getting the wine. I told her that I wanted her to take that instead of the liquor as long as she had to have something and she said for me to get it. I placed the order with the salesman on May 20th to deliver five gallons of muscatel wine at Fort Riley, to be delivered June 1. It was delivered but it was not fit to drink at that time. It had to stand for one month. When it came it was placed in the basement. From May 15 to May 20, 1929, her general health was fair. She was not eating anything to speak of, because of not sleeping, had frequent periods of hysteria, crying, and appeared to be very much worried. I left the house for my work at about half past seven or a quarter to eight as usual. I saw Zenana (Mrs. Shepard) about noon when I came to lunch. She was under the influence of alcohol. I smelled liquor on her breath and she acknowledged that she had had several drinks. I scolded her for it. I do not recall just the remarks she made. She said that she was tired of it all or words to that effect. As near as I can remember I had lunch at home. As far as I know I was on duty as attending surgeon up to 4 o'clock. I next saw Zenana about 4 o'clock, when this salesman was in the quarters (the salesman from whom I bought the wine). I had talked with Major Hawley about her condition and asked him to come and see her. I know Major Hawley. Mrs. Shepard had consulted Major Hawley in a professional capacity in the month of March or April of that year. He came over at one time, whether it was right then or not I do not recall. There was no emergency. Mrs. Shepard had a rash on her neck and chest, it was itching. Major Hawley prescribed a lotion to relieve the itching. I asked Major Hawley what he
418 thought it was, and he said it was probably a gastro-intestinal upset, due to the stomach. I talked with him

about alcoholism and he said I was exaggerating it. At 4 o'clock on the afternoon of May 20th I do not recall any particular change in her condition from what I noticed at the noon hour. After I returned home about 4 o'clock I remained there during the afternoon and evening; that is, from that time on as nearly as I can remember. We did not have dinner. We had a few sandwiches about 6:00 or 7:00 o'clock. Mrs. Shepard brought them in from Junction City or some other place when she returned. She only ate a bite of one. She said she was not hungry. After Mrs. Shepard had eaten a bite of this sandwich she lay down on the davenport in the living room and immediately fell asleep. I sat listening to the radio for a little while, and I went in the dining room to where I had a table with a typewriter and was doing some typing. I should say in about an hour or so I heard a noise. I looked out and Mrs. Shepard was not on the davenport and when I got out into the room she was on the floor. (Crying.) I heard the testimony of Captain DuFrenne that I had said to him upon Mrs. Shepard's return from some trip that afternoon in her car, I had told him that she looked very tired and that I fixed her a highball. That is not correct. I could never prepare a drink for Mrs. Shepard that would satisfy her. I did not prepare a drink for her that evening. Mrs. Shepard had been under the influence of liquor. After I heard the crash and heard a fall I saw Mrs. Shepard sitting on the floor in the hallway, lurching against the kitchen door. She was in a dazed condition. I asked her what the trouble was, and she said she could not see. I said "What have you been doing?" She said, "I guess I am drunk." I asked her what she had been taking, and she said she had taken a drink of something she had. I tried to raise her up, but she could not stand. I picked her up and carried her into the bedroom. I laid her on the bed, she was fully dressed. She sat up in bed and began to pull the edges of the clothes over,
419 trying to make patterns and began to pick things out of the air, and I asked her to lie down and she would say, "Now, wait just a moment," and she would just go ahead pulling the bedclothes again. The telephone rang I believe, and Mrs. Skow called and I asked her if she would come right down, that Mrs. Shepard was very ill. She was one of our neighbors and the wife of Lieutenant Skow. She came over very shortly. I had called Major Strickler, told him her condition and asked him to come over. Major Strickler came

shortly afterwards. He made an examination. He was there 20 minutes or half an hour. He ordered a hypo for her and suggested that she be put on luminol, a nerve sedative, that he would come back and see her in the morning. I had luminol in my satchel. The hypo was given at that time. I do not recall whether I gave it or Major Strickler. It was Major Strickler's orders. No other medicine was given at that time that I can recall and no other physician was called in that evening. Mrs. Skow helped undress Mrs. Shepard and helped me put her in bed. She became quiet after she had the hypo. I told Major Strickler that the hospital was the proper place for Mrs. Shepard but she was absolutely opposed to a hospital and I would get a nurse. I tried to obtain one of the Army nurses but found it was against regulations to allow nurses to go to officers' quarters. The chief nurse said she would phone for one from Topeka. The nurse arrived about midnight that night. She was Miss Brown, the lady who testified. I met her at the train. While I was absent, Mrs. Skow stayed with Mrs. Shepard. She came shortly before I left for Junction City and was there until the nurse arrived and I came back. I was gone I would say about an hour. At the time I met the nurse and took her back to my quarters I told her Mrs. Shepard had a nervous breakdown. I think it was the next day or the day after, I do not recall, I told the nurse, "This is an alcoholic case and there is no need of keeping a record." I believed at that time that it was. Major Strickler saw her the next morning. I do not know whether I was present. He prescribed for her and called to see her at various times. Major Dye was called in I
420 think the following morning, to examine her eyes. She could not see or what she did see was double and the pupils were markedly dilated. Major Dye suggested that she receive calomel and salts and compresses at her eyes. I know she received the calomel and salts and I am almost sure the compresses were applied by the nurse. Major Dye called later. He was in attendance on Mrs. Shepard as nearly as I can recollect about a half dozen times. I was not present at all the times or every time when Major Dye or Major Strickler called. Either the second or third day Major Hawley called. I told Major Hawley what Major Strickler had prescribed and he said to keep that up; that is, in regard to the luminol. I asked him about some soda and bismuth for her vomiting and he said he thought it was a good idea. Whether that was

the visit he made, the first visit, or the visit a few days later I do not recall but he was consulted about the medicine that was given her. Major Hawley told me to get some sodium phosphate for her, and the preparation he asked me to get was not in the supply at the hospital and I secured it at the drug store in Junction City, not on prescription, it was just bought. It was some effervescent sodium phosphate, more pleasant to take than the ordinary sodium phosphate. It was administered to Mrs. Shepard by the nurse. Major Hawley was in daily attendance on Mrs. Shepard from then on; sometimes once a day and sometimes twice a day. I heard Major Hawley testify that he called on Mrs. Shepard during her last illness either 30 or 40 times. As nearly as I can remember that is correct. Major Rose, he was Captain Rose at that time, was later called in. He was a dentist on duty at the hospital. It was five or six days or possibly a week after the onset of her illness. I was present. I do not remember whether Major Hawley was present on the first visit or not. Dr. Rose prescribed for her. He went back to the hospital and brought down some preparations to use. He stated that she had a severe case of trench mouth or Vincent's angina; that it would need a forcible treatment to overcome. After he examined her mouth he went back and made another visit and brought the preparations to use. He used them. He left
421 a bottle of mouthwash which was to be used every two hours by Mrs. Shepard. The bottle was on the table beside the bed in her room. As far as I know any instructions Major Hawley left were carried out. Major Rose was there in attendance on Mrs. Shepard every day from the time he started to treat her, sometimes twice a day. Major Dye called six or seven times. I do not recall the exact number. So far as I know all of Major Dye's and Major Rose's instructions were carried out. I remember when Major Rose called in connection with her going to the hospital to have some teeth extracted. It was talked of several days prior to her going to the hospital. It was in Mrs. Shepard's bedroom. Major Rose said that she had some devitalized teeth and that they ought to be out but that he could not extract them in the quarters. He said she ought to go to the hospital to have it done. I asked Mrs. Shepard if she would consent to go to the hospital and she said she would not. In talking about hospitals Mrs. Shepard had made these statements so many times that I do not recall. At the time this extraction of teeth

was talked of, Mrs. Shepard refused flatly to go to the hospital at first. Colonel Grissinger called me into his office and told me that Major Hawley's hands were tied unless Mrs. Shepard would come to the hospital and have those teeth extracted; that they had done everything they could and they were of the opinion that the teeth were the cause of her mouth condition, that extraction might help her condition generally. I told Colonel Grissinger that I had urged Mrs. Shepard to go to the hospital; that she had refused. He said he could not do any more.

Q. But, tell the jury what was said to Mrs. Shepard, and what she said in reply, if anything?

Mr. Brewster: We object to this as incompetent and immaterial.

Mr. Class: I am speaking, now, about Mrs. Shepard, your honor.

Mr. Brewster: Statements by Mrs. Shepard to him are incompetent.

Mr. Class: Certainly they are not.

The Court: Very briefly, yes; he may answer.

Mr. Brewster: Let me ask: Are these offers a part of the res gestae?

Mr. Class: We are offering this as part of the res gestae, at this time, and the history of the case, and particularly during her last illness and death, as has been elaborately covered by the prosecution.

Mr. Brewster: We have attempted to offer statements made by different parties.

Mr. Class: That is another thing.

The Court: All right; I will let you go ahead.

Mr. Class: Read the question, Mr. Reporter, please.

422 (Last question read as above recorded.)

A. I told Mrs. Shepard that the doctor's hands were tied, unless she would consent to go to the hospital, and have her teeth extracted. She said, "You are trying to get out of your promise that you would not send me to the hospital."

Q. What did you say?

A. I told her I was not; that this was an emergency, and, if it would help her, that she must go.

Q. You spoke about—go ahead.

A. She replied that I would be asking her to have an operation, or, if anything happened to her, that she would be cut up. I told her that I would do nothing of the kind, that,

if she would go to the hospital and have her teeth extracted, that I would assure her that nothing else would be done. She said, "All right; I will go, provided I can return as soon as the teeth are extracted."

The next morning after she was taken sick she said to me, "You are not going to send me to the hospital, are you?" I said, "No, not unless you want to go." She consented to go to the hospital. I think it was four days before her death. She remained until the following day and asked me to take her back home. I did. During Mrs. Shepard's illness I took samples of urine to the hospital more than once myself. I delivered them to the laboratory to either Sergeant Gresser or his assistant. I do not recall at whose suggestion, and there was nothing out of the ordinary about the findings that I know of. I obtained it from the nurse. While Mrs. Shepard was very ill, and during the last illness, Major Hawley said to me as he has testified here that "Mrs. Shepard was a damned sick woman," and "I do not know what is the matter with her?" He said "You ought to get the best internist that can be found to diagnose her and wait upon her." I told him I would get anyone that he suggested. Dr. O'Donnell of Junction City was called in. Major Hawley called him. It was a few days after her hemorrhage and ten or twelve days after May 20th. Doctor Hawley also mentioned some men in Kansas City. I do not recall their names. I told him anything he suggested. No one from Kansas City attended her. Captain DuFrenne came the first time somewhere about ten days or a week prior to her death. I was present. He examiner the abdomen, he said, "There is nothing in the abdomen." He made no other diagnosis at that time that I can recall. Captain DuFrenne called later. He was there the day of her death, whether he came before that or not, I do not remember. He called between that time and the time of the transfusion. He was called at the time of her hemorrhage, early one morning. I do not remember him giving any specific treatment or recommending any. Dr. Strickler was in attendance on Mrs. Shepard after the time he called upon her and on several occasions later. He came for a few days after the start of her illness, and then stopped and later came back again. I asked him why he did not come and he said
423 there were so many coming he did not see what he could do. Major Strickler, Captain Dye, Captain Rose. Captain DuFrenne, Major Hawley and Doctor O'Donnell all

waited upon my wife during her last illness, and Captain Johnson was also called when we could not locate the other doctors when she had this sinking spell. He was a medical officer. He was the officer-of-the-day that day. He gave her a hypodermic of adrenalin, a heart stimulant. Mrs. Shepard was taking capsules of soda and bismuth for the nausea and vomiting and also help relieve the diarrhea which she had, and she was also taking capsules of luminol. Major Strickler prescribed the luminol and talked of it to Major Hawley and Major Hawley approved. I suggested to Major Hawley the bismuth and soda and he said it was all right. The capsules were obtained from the hospital. I got them at various times during her illness. That was not the only occasion I had to use capsules. I always had capsules in my case and I was taking capsules myself. I got capsules by the hundred, 100 in a box at a time, because I fill my own capsules with what I was taking myself; I kept a supply in the house. It was not necessary to write a prescription to get them from the dispensary. I prepared the capsules and brought them in, laid them on the tray beside her bed and gave the nurse instructions when they were to be given and how often. As far as I know they were given. I did not give her any. There was no other supply kept in the house other than those that were on the table except the capsules I was taking myself. I heard Miss Brown the nurse testify that I had brought in these capsules one at a time and given them to her myself. That is not true. I was not there all of the time during Mrs. Shepard's last illness. I spent as much time there as I possibly could but I attended to my duties as attending surgeon just the same. I came back to the house as soon as I could between calls to see how she was. About a week prior to Mrs. Shepard's death, I had to give a lecture at Hiawatha before the medical society. I asked Major Hawley if it was physically safe for me to leave Mrs. Shepard? He said it was. Major Hawley, Major Strickler and myself left Fort Riley about 1 or 2 o'clock in the afternoon and we arrived
424 back about 4 o'clock the following morning. There was no other extended absence, other than my regular duties that I recall. I spent as much time as possible at the bedside. The blood count of Mrs. Shepard was required to be taken by some physician or surgeon skilled in doing that kind of work. There was nothing requiring extraordinary skill, knowledge or ability to transport from the patient's home samples of urine

to the laboratory. It is not customary for any employee or attendant from the laboratory to call upon the patient at his home to obtain samples of urine. After Mrs. Shepard was returned from the hospital she was very much weaker. She was very much depressed. I talked to her at different times. On the day she died I had a talk with her. She told me she was going to die. She told me what she wanted done with certain things. I tried to cheer her up, told her she had had one transfusion, and she would feel better and we would give her another one the next day, and she would be all right. That was the last day. She was very weak and depressed before the transfusion was had. She was able to converse, able to talk and answered questions. After her first hemorrhage Major Hawley and Captain DuFrenne talked about a transfusion, that it might be necessary to have one. I should say that was 10 or 12 days or 2 weeks before her death. After Mrs. Shepard became ill on May 20th, I was advising her brothers, Theodore and Curtis in Los Angeles almost daily, both by letter and wire. They called me on long distance telephone from Los Angeles after word was received that Mrs. Shepard was critically ill and asked if I thought she would live long enough for one of the boys to get there. It was a question of whether Curtis or Ted would come and Mrs. Shepard was consulted. She said she did not want either one of them to come. I said, one of them should come; and she said Curtis could not leave his boy and it would be better if Ted came. I do not recall the exact date he arrived but I would say a week before her death. I met him at the station and advised him of the condition of his sister. I told him that
425 Mrs. Shepard was critically ill, that anything we seemed to be doing or anything that was being done was not helping her. I told him that her condition was due to chronic alcoholism. After Ted arrived there was some blood typing or blood count made. Both Ted and myself reported to the laboratory and had our blood typed in case it became necessary. Kitty McCoskey arrived four or five days prior to Mrs. Shepard's death. The blood transfusion was on June 15th, approximately at 1:00 o'clock. Captain DuFrenne performed it, and was assisted by Major Hawley. From the time they started to take my blood to the time it was given to her, I should say it was 20 minutes to half an hour. After the transfusion Mrs. Shepard so far as I observed, felt better. Ted, Kitty and I were standing by the bed, and I do not know

just what did cause the remark but Mrs. Shepard said, "I want you to get out, and stay out." She did not go to sleep right then. I sat down beside the bed and talked to her for quite a few moments. She began to shake while I was talking to her and I asked if she was cold. She said no; she was not cold, she was nervous; and in a moment or two afterward she stopped talking and I tried to speak to her and she did not respond and I went to the door of the McCoskey's room and opened the door and told them to hurry, Mrs. Shepard was sinking. Ted and I tried to get officers over the telephone but Major Hawley was out, Captain DuFrenne was in Junction City, and by the time Ted and his wife were dressed, I had remained with Mrs. Shepard; Mrs. McCoskey went to the telephone and finally succeeded in getting Captain Johnson, the officer-of-the-day. Ted McCoskey had gone out on the golf course and located Major Hawley and Captain DuFrenne arrived later. Major Hawley arrived after Captain Johnson had been there. Mrs. Shepard passed away about 5 o'clock in the afternoon. About a half or three-quarters of an hour after her death I saw Major Hawley at my quarters. Major Hawley asked me to step outside on the back porch; he said, "We would like to look into that belly." I said, "What good is it going to do now?" I said, "She has gone, and it will not help her." I said, "You have all been in attendance for almost a month, and it will not do any good." He said
426 that Colonel Grissinger had sent him down to request an autopsy, and I said, "Well, you may tell Colonel Grissinger there will not be any, because I have promised Mrs. Shepard she would not have one—would not have to have one." I had promised her several times but particularly at the time I had requested her to go to the hospital, that was over a period of years. Mrs. Shepard had heard me talk about autopsies and operations as the wife of a physician would, and Mrs. Shepard had a beautiful body—took good care of herself—she never wanted a knife to touch her body. I made her the promise that it would not be done. Major Hawley did not say anything about a death certificate at that time. At the time Major Hawley was attending Mrs. Shepard and said she was a damned sick woman and was not going to get well, I told him, "Well, in case of her death, there will be no autopsy," and that is the extent of that as nearly as I can recall. A short time after Major Hawley and I had the conversation on the stoop of my quarters, Colonel Grissinger

and General Symmonds came in. Colonel Grissinger was commanding officer of the hospital; General Symmonds was commandant of the school of *the school of* cavalry. He was commanding officer of the post. I had a conversation with them. General Symmonds said, "Major, I have come over to get your permission for an autopsy, and if I do not get it, I shall have to take official action." I said, "I have no objection to an autopsy, only the promise to my wife." Colonel Grissinger said, "Well, major, we cannot sign the death certificate." I said, "Well, then that is all that is necessary; you are simply making me break my promise to my wife." General Symmonds said, "Where are the remains? Are they here?" I said, "No; they have been taken to Junction City." He said, "Well, we will send and get them." Colonel Grissinger said that it was not necessary, that it could be done over there. I then telephoned the undertaker that there would be an autopsy as I had previously told him that none would be held. I gave the general my permission to hold the autopsy. In my first conversation with Major Hawley after the death of my wife I told him that they had all been in attendance for nearly a month, and if they did not know what was
427 the trouble with her, it would not help her any now to have an autopsy. There was absolutely no other reason except the promise I had made to my wife, and the statements which she had made to me with respect to opposition to an autopsy, for my refusal. After these conversations we went over to Junction City and picked out a casket. The funeral services were held in the chapel at Fort Riley. She died Saturday and they were held Tuesday as nearly as I can recall. I had wired Curtis McCoskey to have a grave opened in my family lot, and that I had sent the deed of the lot on to him by mail, and to have it ready Friday morning, I believe. I received a wire back asking me if I did not know that Mrs. Shepard did not desire to be buried in Englewood or in that family plot. I replied that I did not know but to hold up arrangements until we arrived. Ted and Kitty accompanied the remains with me to Los Angeles. After we arrived Curtis and I went to the hotel and he told me that Mrs. Shepard had expressed a dislike to being buried next to my daughter; that she desired cremation, and that the family wanted cremation. I said, I had always been opposed to cremation and he wanted me to go out and look the place over, and see what it was like, to which I agreed. I finally

said, if that was Mrs. Shepard's wish, and it had been expressed to them, in that way, all I could do was carry out her wish. During her lifetime I had heard her say on several occasions that she did not know what she wanted, whether to be buried or cremated; there was absolutely nothing definitely settled, one way or the other. Services were held in the crematory in Los Angeles and the remains were cremated and the ashes placed in a crypt or niche. (Witness here examined Government's Exhibits 14, 15, 16, 17, 18, 10, 11, 12 and 13.) They are in my handwriting with the exception of designation of one tube of 20 tablets, which is not in my handwriting, on government's Exhibit 16. The entire prescription of this one, it is my signature, but the handwriting is not mine. That is, the government's Exhibit 18. Government's Exhibit 17 is in the handwriting of Major Hawley. It is not in my handwriting. Government's Exhibit No. 11 was written
428 March 1, 1929, "Spirits fermenti." It was whiskey, four ounces directed to be used in hot water. That was a prescription given by me for Mrs. Shepard for whiskey from the hospital in place of using bootleg whiskey. It was government whiskey. Exhibit 14: is a prescription, December 25, for Mrs. Shepard, ethyl alcohol, 8 ounces; "To be used as directed". Mrs. Shepard used that alcohol for rubbing after pains. The government's Exhibit 10 reads as follows: "April 8, office of attending surgeon, Alcohol and mercuric bychlorid, 8 ounces"; no directions; and signed by myself. This prescription was obtained by me, as attending surgeon in the treatment of running ears in measles cases and was carried in my satchel. That was a complication that follows measles. We had an epidemic of measles about that time. There must have been pretty close to one hundred cases at Fort Riley, the town of Ogden and Junction City, in connection with the military personnel that lived in those places. That epidemic lasted quite a long time. It was in April and May and some in June. My duties were to attend those cases that were not in the hospital, take care of them, prescribe for them. Running ears is known medically as otitis media suppurative, commonly named running ears and that is the technical name; it is a discharge into the ear and is very common after measles. After I procured this preparation I put it in my satchel and used it on these cases. It was the proper treatment for such cases. I would say I treated from ten to twenty cases of it. Government's Exhibit 15, dated April 12, 1929,

was for four ounces of alcohol for Mrs. Shepard and as far as I recall Mrs. Shepard used it in rubbing. Mrs. Shepard had a great deal of trouble with her shoulders and neck and had to have massage treatments for that. Whether any of that was used by her in drinking, I do not know positively. I had it filled and it was turned over to Mrs. Shepard. Government's Exhibit 13 dated 5-14-29 is a prescription for Fowler's solution in arsenic, the directions, 3 drops in water as directed. That was a tonic that I had given Mrs. Shep-
429 ard that she took before meals to build her up, after these depressive spells, to increase her appetite. Government's Exhibit 16, dated 5-25-29 is a tube of hypodermic tablets, morphin sulphate, one eighth and written in, probably by the clerk who filled it; it is marked "One tube of 20 tablets". These were used by me as a hypodermic injection for Mrs. Shepard when she became hysterical. The ordinary medicine did not seem to control her and it required morphin to quiet her. Government's Exhibit 18 dated June 1, 1929: This was for a quart of ethyl alcohol, labelled as such and as well as I recollect, was given to the nurse to be used in bathing Mrs. Shepard during her last illness. Ethyl alcohol is pure grain alcohol, alcohol that does not contain any poisonous material. It can be mixed with water and drunk. Government's Exhibit 12 was for 6 ounces of alcohol, for Mrs. Shepard to be used for the same purpose. It was written on June 4, 1929. There was no secrecy about any of these prescriptions or any mystery about them. I did not ask the clerk to say nothing about them. After they were filled as far as I know they were turned over to be used during Mrs. Shepard's illness, turned over to the nurse to be used; prior to that they were in the quarters and Mrs. Shepard used them. I have never seen them since the day they were written and delivered to the clerk at the dispensary until produced by Mr. Brewster, General Brewster, the district attorney at the trial. Government's Exhibit 17, signed by Hawley. This was a prescription given by Major Hawley in June for the same purpose. I had talked to Major Hawley about the whiskey. Colonel Grissinger was very much opposed to the Army medical officers using whiskey in their practice, and I procured so much whiskey for Mrs. Shepard that I asked Major Hawley what Colonel Grissinger would say in regard to so many prescriptions. Major Hawley said he would talk to Colonel Grissinger about it, and later told me he had and it was all right. I met

Major Hawley when I reported for duty at Fort Riley.
430 I did not know him in any other way except as a brother officer stationed there. He was chief of the Medical Service of the station hospital and was my superior officer in the Medical Corps. I did not have anything to do with the entry on defendant's Exhibit C, reading: "Cause of death as follows: gastro-enteritis, acute, severe, cause undetermined." I heard Major Hawley testify that on the occasion of his calling at my quarters shortly after the death of Mrs. Shepard with respect to a death certificate, in substance, that I said to him that he could put anything on that; that he could put anything on a death certificate. I did. There was nothing said by me to Major Hawley at that time and place in substance, that Major Hawley could put anything he pleased or he chose on a death certificate; whether it was true or false. I met Mrs. McCoskey at the train when she arrived at Junction City. That was four or five days before Zenana's death. I explained to her the illness of Mrs. Shepard. I told her it was due to the excessive use of liquor. I heard the testimony of Mrs. McCoskey that I had stated to her that on the day Mrs. Shepard was taken ill, May 20th, that I had mixed her a highball on her return. I have no distinct recollection at this time, that anything was said about mixing a highball. I might have said that Mrs. Shepard had taken a highball but I did not say that I had given her one. I arrived in San Antonio, Texas, after leaving Fort Riley about September 1, 1928. I made my home at 2604 North Presa Street, Mrs. Wylie's boarding house. For the first month and a half my time was practically taken up. I was at school all day long—the work being entirely new to me, I had to study pretty late in order to prepare my work for the next day. After that, it was a little easier and I had a little more leisure in the evening. I met Miss Grace Brandon while I was rooming at Mrs. Wylie's. It was about a month after I started to room there. There were four Army officers, and several civilians and then several ate their meals there, who roomed across the road. As nearly as I can recall it was somewhere about the first of November. As nearly as I can remember it was somewhere about November 10th that I first went anywhere with her. During the month of November I should say
431 I accompanied Miss Brandon, or she accompanied me perhaps half a dozen times. I did not discuss my domestic affairs or make any statement of my home life with

Mrs. Shepard to her. A trip was made to Eagle Pass, or Laredo, Nuevo Laredo about the latter part of November. There were four in the party, Miss Brandon, Lieutenant Sayre, another young lady and myself. We were gone all day. We visited a saloon. We were there 20 minutes to half an hour, as nearly as I can recall. We had several drinks there. There were several toasts made by different ones in the party. All the toasts were in jokes. One toast was, "Here's to a safe trip", referring to the return trip home; we had an escape going down from a car that suddenly came into the road from a side road, that rather frightened us all; then there was some toast to "Happy days", or "Happy days for everybody", or words to that effect. On that occasion I did not make love to Miss Brandon or caress her either going down or coming back. I left San Antonio for Fort Riley, about December 7 or 8. My graduation I believe was December 6th. I gave Miss Brandon a number of presents such as flowers, candy and other articles, while there. I gave her a bracelet while I was there in the school, and I bought some flowers when we went out to a concert, I believe it was in the auditorium; there were four of us in the party. I admired Miss Brandon; she was very kind and sympathetic, and was the first woman in years that had ever taken any interest in me. I did not tell her I loved her while I was in San Antonio in November or December. There was nothing said about love or marriage. There was no word of divorce. We agreed to correspond after I returned and we did. I do not recall the first letter I wrote Miss Brandon. It may have been several days after I returned to Fort Riley. I wrote to her after I returned to Fort Riley and advised her of my safe return. I wrote Miss Brandon in regard to Mrs. Shepard's habits and also the bills that had been run up. She replied. I cannot say how many letters passed between me and Miss Brandon after I returned to Fort Riley up to the time Mrs. Shepard passed away. It may have been two or three
432 a week; it may have been more; it may have been less; I cannot say positively. There was no regularity. We wrote frequently. I sent Miss Brandon a toilet set about Christmas, 1928. The one that is in evidence here. I purchased it at Scott's store in Junction City. While they were wrapping up the toilet set I was looking around the store and admired one ring particularly and said I might possibly be interested in having one later on. She said something to the

effect that we will just put one aside for you until you come in later. Sometime in February I did. Miss Brandon's birthday was February 23d. She had written and told me so. The price was about $10.00. I sent the ring to Miss Brandon in order to express a sentiment of friendship and admiration for her. When I was in San Antonio I told Miss Brandon about the bird I had and its singing and how I missed it and she said she would like a bird, too. I bought the bird in Omaha and had it send down there substantially as the gentleman from Omaha testified. I also during the year 1929 and prior to the death of Mrs. Shepard made arrangements to have some flowers sent to Miss Brandon. I ordered an Easter Lily to be sent to her on Easter and sometime about May 1, I ordered some flowers sent on Memorial Day. Out side of the toilet set, the ring, the canary and the flowers and possibly some books I do not recall anything other than I have testified. There was no engagement or understanding *of any kind that I* was to marry Miss Brandon until June 15, 1929.

Q. During the year 1929, and prior to the death of Mrs. Shepard, did you send to her, or make any arrangements to have sent to her, any flowers or presents?

A. I did.

Q. What were those arrangements, and when were they made?

A. I ordered an Easter Lily to be sent to her on Easter, and sometime about May 1, I ordered some flowers sent on Memorial Day.

Q. Were there any other gifts, or present, or remembrances, or favors, sent to her, other than those to which you have just testified, the toilet set and the ring and the canary and the flowers, possibly some candy during that time?

A. Ontside of candy, and possibly some books, I do not recall of anything.

Q. Had there been any engagement, or understanding of any kind, major, from the time you met Miss Brandon, until June 15, 1929, of any engagement to marry?

A. There was absolutely no engagement, of any kind.

Q. Did you advise Miss Brandon of the passing of Mrs. Shepard?

A. I did.

Q. When?

433 A. I believe it was the same night Mrs. Shepard passed away.

Q. In that letter, as I recall it, Miss Brandon testified that you had written to her, advising her that Mrs. Shepard had passed away; that it would probably be for the best, and that you had done everything that you could for her: What do you say as to whether or not that is substantially correct?

A. That is, as nearly as I can recall.

Q. I think she also had something to say about your conscience; Was there anything in there about your conscience, anything of that sort?

A. From what she said, I said my conscience was clear; I meant everything possibly that could be done; I meant I had not left anything undone that might have benefited her.

After my arrival in Los Angeles I received a wire from Miss Brandon saying "Much Sympathy" and signed her name. I answered her wire I believe that same night or the next morning by letter. I stayed the first night in Los Angeles at the hotel. The remainder of the visit I spent between Ted McCoskey's and Curtis McCoskey's home. I had a visit with General Ireland.

I intended after Mrs. Shepard's funeral to go on
434 to Washington to see General Ireland to see if I could not be transferred to the Air Service, and, en route, I learned that General Ireland was to be in Los Angeles and San Francisco. I wired Major Marietta at San Francisco to find out what day Major Ireland was going to be there but when I got to Los Angeles I found he was to be there I believe the next day and I made an appointment to see him. I advised him that I was desirous of being transferred to the Air Corps because of the increase in pay and as long as I had taken the course I wanted to make use of it. I simply asked him to be assigned as a flight surgeon. I heard his testimony and it was substantially correct. Later I wired General Ireland, at his request—he told me, if I changed my mind to wire him, and I wired him I would like a transfer to the station hospital at Fort Sam Houston and if that was not available I preferred to remain where I was. I knew that if I were to be transferred to the Flight Corps it would be better to be on hand and available at one of the flying fields. The fact that I knew Miss Brandon and had had correspondence with her and given her these trinkets prior to this time did not influence me or control my decision or request to be transferred to San Antonio. While in Los Angeles I received a special delivery letter from Miss Brandon. She

asked me if I would not stop and see her on the way back to Fort Riley. I replied that I had remained longer in Los Angeles because of seeing General Ireland, and that I would not have time. I thought my leave was up. When I got back to Fort Riley I found I still had six days leave. I received word that Major Brown who was on duty at Kelly Field had intimated that he wanted to return to the regular Medical Department; we had talked some of it; and I drove down to interview him to see if he would make a mutual exchange with me at Fort Riley. That was the object and purpose of my visit to San Antonio. When I got there I talked with Major Glenn and then I went over to Kelly Field and saw Captain Brown and Major Gates and Major Bevan. I had not seen Miss Brandon at that time. I saw her one evening and I believe the following afternoon. I left
435 early in the morning about 4 o'clock to drive back. I drove down and back. It was the car I had given Mrs. Shepard after my return from Brooks Field, a Chrysler. No love matter was discussed between us on that visit. She was very sympathetic on the loss of my wife and expressed sorrow, and,—I do not know as there was anything definite she said that I could recall at this time. We agreed to correspond. I went down again along the latter part of October or the first part of November, 1929. I think it was about October 19th. The latter part of July I was taken to Denver as a patient; I had a duodenal ulcer and severe hemorrhages. I was carried on a stretcher. I was in bed at the hospital for about 12 weeks and then I was two weeks or more in an ambulant state, and I was given a month's sick leave. After my return from San Antonio to Fort Riley I had some correspondence with Grace. It may have been three or four letters a week, it may have been less. After my return I sent the mesh bag to her and one necklace. The necklace was one I had obtained in the Philippines. The mesh bag had belonged to Mrs. Shepard. I had no near relatives living in the United States except a niece living in Denver, my brother's daughter. My mother and father are both dead.

Q. No sisters?

A. No brothers or sisters, no.

After my severe illness had passed I wrote some let-
436 ters to Miss Brandon. I wrote while I was sick. The exhibits received in evidence about honeymoon plans were written and sent to Miss Brandon after I got out of bed

from my illness. I was in Colorado. I left Denver sometime in October. I went to Fort Riley to see about my household goods. They had been moved out. I had received word while I was ill, I would have to give up my quarters and move into bachelor quarters and I had written one of my brother officers to look after the packing of my goods. I went there and spent four or five days and then I drove on down to San Antonio. I made arrangements with Sergeant Gresser that the one to Grace was to my niece. I did not think it was anybody's business who I was sending wires to. I drove the same car down to San Antonio. I do not know the exact date but somewhere around November 1st or a few days later. I stopped overnight at a hotel in Austin and I called Miss Brandon by long distance telephone from Austin. I met Miss Brandon after I arrived in San Antonio. She was living at the same boarding house. I stayed at the Gunther Hotel. I was there 11 or 12 days. I saw Miss Brandon every day. I went out with her. We went to picture shows together and on drives. We were engaged at that time. I loved her and told her so. She told me that she loved me. I heard Miss Brandon testify that when I was down there in July that I wanted to marry her. There was nothing of that kind said.

Mr. Class: Q. Did you have a conversation with her major, about any secret marriage; and when was it?

A. I had no conversation with her about any secret marriage. I never intended any secret marriage.

Q. You were going to be married, as I understand it, or understood so, on this trip down there in October.

A: It was.

Q. Did you give her an engagement ring at that time?

A. No; she received her engagement ring while she was visiting her parents in October. The engagement ring was sent from San Antonio to her.

Q. Was the engagement discussed on that trip down there with her?

A. She had already received her engagement ring when I got down there.

Q. Oh, I beg your pardon; when did she receive the engagement ring?

A. Sometime in October.

Q. Yes; I think that is right. Was she wearing it?

A. She was.

She spoke about keeping, when we were married, to
437 keep it secret from her parents. That was sometime in her letters. I do not know just the exact date. I never intended any secret marriage and I had no conversation with her about any secret marriage. She received her engagement ring while she was visiting her parents in October. She had already received it when I went down there and was wearing it. I know of Major White. I heard her testify that we had a quarrel arising out of her going
438 out with Major White while she was wearing my ring, and while I was in town. I resented the fact that she was going out with him while wearing the ring, and while I was in town. That was patched up before I left. The marriage was set for the following Autumn, 1930. I returned from San Antonio to Fort Riley by train. I left my car there to be taken in on a Buick car for Miss Brandon, providing I could make suitable arrangement for the amount that was still owing on the car. I talked with Miss Brandon about the purchase of a car for her. She said she would like a Packard. I told her I could not afford it. I make the arrangements and the Buick car was delivered to her later on. I returned to Fort Riley the middle of November and remained a couple of days then I went on to Denver when my leave was up. I remained in Denver. I received an order after I returned, assigning me to Denver for duty. After my return I made out other schedules about honeymoon trips. I made out several. I made out one or two schedules while I was recuperating. The others were made out sometime during the winter or spring of 1930. I believe in February or March, 1930. I sent her the fitted bag in late spring or winter of 1930, I believe in February or March, 1930. I do not recall the exact time. I sent her the dinner ring; I had it delivered to her from a store in San Antonio. I never saw the ring after it was ordered. She accepted the ring for Christmas, 1929. I sent her the beads and other gifts about the time that she testified. I did not send her the suit case. I sent her the dinner gown or sweater after we were engaged to be married. Miss Brandon and I talked about her tastes in books we had been reading and liked to read. I told her that I had many books given to me by patients and if she would like to read them I would send them all to her. The books offered in evidence, entitled "Ways of Escape", "Not to be Opened", "The Dartmouth Murders",

"Murder on 'B' Deck", "The Poisoned Chocolates Case", "A Mysterious Disappearance", "The Devil and the Deep Sea" and "The Cobra Candlestick", did not have anything to do with my courtship of Miss Brandon, other than I sent them to her. I did not purchase any of the books. I read some of them before I sent them to her. She was not the only person to whom I gave books. There was nothing said while I was in San Antonio in the fall of 1929 about her concealing the ring from her parents. Neither was there any discussion that our engagement was to be kept secret. I
439 told different officers at Fitzsimons that I was engaged to marry her and asked for leave. One has to ask for leave several months ahead because of the large number of officers there. I told Colonel Cooper, assistant chief of the Medical Service my reason, because I wanted a month and the officers were only being given two weeks and he wanted to know the reason why I wanted a month and I told him then; and I told Colonel Halloran the commanding officer. I believe it was in February as nearly as I can recall. From the time I was transferred or assigned to duty at Fitzsimons to the date of my arrest I corresponded with Miss Brandon about every day. I think the correspondence was about evenly divided. I wrote to her about the same number she wrote to me. I was taken into custody about the 17th of March, 1930. I was first consulted by representatives of the Department of Justice in the commanding officer's office at headquarters, Fitzsimons General Hospital. One of them was Mr. Caffrey and I do not know the other man's name. Colonel Halloran said that these men wanted to talk to me about something—I was to accompany them downtown. We went to the federal building, the post office building, in Denver. I heard the statement purporting to have been made by me on that occasion as it was read by Miss Jane Leader from the witness stand a few days ago. As nearly as I can recall it was correct. At the time this interview commenced I was not informed by anyone that there was any suspicion attending the death of my wife. Nothing was said when the interview commenced that I was suspected of having a hand in the death of my wife. Sometime during the questioning, probably an hour or so after they started to question me I began to realize from their questions what they were hinting at. I got the hint from Mr. Caffrey. He began to ask me what I was carrying in my case and asked me about Mrs.

Shepard's illness and death. That was before he called me a liar. That interview lasted from about I should say half-past five—it was 11 o'clock when I was arrested. 11 o'clock at night. I was in uniform and I called the chaplain up and asked him to bring down my civilian clothes, and he
440 came to the jail with my civilian clothes about 3 o'clock in the morning. I remained in the warden's office until my clothes arrived and changed. I passed the remainder of the night in jail. The next morning the marshal came for me and took me back to the federal building. Mr. Caffrey handed me a statement and wanted me to read it. After reading it over I put it down. He asked me to sign it; I told him no; I would not sign it, that I had thought things over during the night, and I realized I had made statements that were absolutely incorrect, that I was nervous and upset during the questioning; and I refused to sign the statement. I did not sign it; I told him I would sign it only in the presence of an attorney. He wanted me to make corrections and changes then and I said I would not do it. I never signed the statement. Up to that time I did not have a lawyer. The next day or so I employed Judge Class. I was returned to jail. I was asked by Mr. Caffrey if I had on any occasion obtained from the dispensary at Fort Riley any bichlorid of mercury tablets, and if I had ever carried any in my emergency kit. I told him no, that I did not carry any bichlorid of mercury tablets in my emergency kit, and I did not recall that I ever had. That I only carried supplies for emergencies because we could write a prescription and they could go to the dispensary and get what they wanted. I carried aspirin, calomel and the like. Over night I remembered that I had. That I nearly always carried them in my satchel and that I never wrote a prescription to give to patients of bichlorid of mercury. If I wanted any bichlorid of mercury tablets I could have gone and helped myself at the dispensary. It would not be necessary for me to write a prescription. It was on this account that I refused to sign the statement read by Miss Leader. When that question was asked me as to whether I had bichlorid of mercury tablets or any bichlorid of mercury in my possession, I stated that I carried in my satchel some ordinary remedies for emergencies. I was not referring or was not thinking of anything that I carried in that satchel for my own use. I believe I told them I did

not carry any poisons at all in my satchel; still, I
441 always carry a hypodermic containing morphin, strychnin, and other things and always had bichlorid of mercury tablets for my own personal use in disinfecting my hands. That was one of the reasons I refused to sign the statement. I know other doctors who carry around in their kits bichlorid of mercury or calomel or drugs for hypodermics or emergencies. There are hundreds. As nearly as I can remember the questions and answers about Miss Grace Brandon and her religion and whether my wife was true to me are correct in that particular, but there were a lot of statements made that night that were not correct. The whole statement, I considered was obtained under duress. I was taken down there after a full day's work and was quite upset and angry over the suspicions they were trying to cast against me. I did not think it was any of their business. That was one of the reasons why I refused to sign the statement. The letter marked government's Exhibit 84 and also government's Exhibit No. 70 were written while I was in jail. They were read by Judge Class. They were posted by him. We had been trying to get in communication with Miss Brandon to find out her attitude toward me and she did not answer my letters or the chaplain's letters. Judge Class suggested that I write to Miss Brandon along the lines which I had *had* been always doing and ask her this to find out just how she was standing and what she had told the agents and her general attitude toward the whole affair. Judge Class and I felt that if these letters fell into the hands of government agents, that in all probability her rooms would be ransacked and she would be subjected to a lot of unwholesome notoriety, and while I did not care about it myself, as I was absolutely innocent in the matter I was simply trying to save her from this notoriety. Judge Class told me to tell her to destroy the letters after she had read them, in case they should fall into the hands of the government. Judge Class did not tell me to burn them; I wrote that myself as being probably the best way to get rid of them. That was my own idea. I knew that all mail addressed to me while I was
in jail was being opened both going and coming with
442 the exception of what I gave to Judge Class. I was deprived of my liberty about five weeks. I was then released on bail. I was released about noon, and I reported for duty about 4 o'clock the same day at Fitzsimons General

Hospital, and have been there on duty ever since. I never administered or caused to be administered any bichlcrid of mercury or any other kind of mercury or any other kind of poison to Zenana Shepard. Mrs. Shepard did not have any children by her former marriage and she and I had no children. I had ceased having intercourse with my wife for over six years prior to her death. The mesh bag was just a plain bag. My wife told me in Omaha that she did not love me, and told me many times while I was stationed there and told me when I came back from Brooks Field.

Cross Examination.

She told me when we were just alone. I corresponded
443 with Miss Grace Brandon after I came back from the flying field in December. Those letters were of friendship and admiration.

Q. Will you let me have the correspondence she wrote you before the death of your wife?

A. That is up to the attorneys.

Q. Do you have those letters?

(No answer.)

Q. Do you?

A. There are some letters there. Yes, sir.

. . . . . .

Mr. Class: I will say we have 150, but I think there have been enough read to the jury.

I did not say those letters were letters in which no endearing statements were made.

Q. But she wrote letters of love?

A. I do not know, at this time what was in those letters.

I did not send her presents while my wife was ill. I did not send flowers while my wife was ill. My wife took sick May 20, I sent flowers the first week of May to the best of my recollection. When I met Miss Brandon at San Antonio we had some friendly visits but there was no love or affection on my part at that time. When we were over there in Mexico there was no plighting of my love. That was just a joke. There were absolutely no kisses.

Q. Did you continue to treat what occurred down there, just as a joke, when you were in Mexico?

A. Why I did it at the time, yes.

Q. Did you afterwards?

A. There was something said in letters afterwards.

Q. About the joke?

A. Yes.

Q. I will ask you if, on Thursday afternoon, May 13, 1930 you did not write, "My dear Sweetheart: Can't I get you to love me again? You have been so dear and sweet to me; I don't deserve you, I know, dear; you always said I was unworthy of you, but I loved you deeply. It will be two years in November, do you still remember when and where we plighted our first love? Do you remember the first 444 sweet kiss you gave me? I was so happy that night to feel those dear arms around my neck."

Q. You wrote that?

A. It does not state when that first kiss was given.

Q. Two years?

A. It does not state that; you are trying to convey something that is not there.

Q. You say "Two years in November"? What was "Two years in November"?

A. Talking about that joke.

Q. What did you mean, "Two years in November"?

A. The joke you are talking of.

When I referred to "That will be two years in November" that is the joke we had. That is all that was meant to be. When I said the part you have just read in that letter I was referring to the troth only.

Q. Only to the troth, as taking place in November, and you meant the kiss might have been some other time?

A. I do not know when the first kiss took place.

To the best of my knowledge and belief I never ordered any flowers for Grace after my wife took sick.

Q. I call your attention to letter bearing date, May 3, 1929; it says "Gentlemen: Deliver to Miss Grace Brandon, 1321 Presa Street, San Antonio, Thursday, May 30, in the morning one dozen peonies, assorted colors, attaching the enclosed card. Mail statement to me here, addressed above. Yours truly."

. . . . . .

Q. Did you send her flowers after your wife took sick?

A. According to that letter, I did.

Q. You paid for those flowers during your wife's sickness, too, did you not?

A. I do not recall; I think they were paid for.

Q. While your wife was lying there sick, you sent a check

on June 6th to pay for the flowers, flowers which you were sending to this girl in San Antonio, did you not?

A. I do not recall just when it was paid.

After looking at Government's Exhibit 31 it is correct that I paid for those flowers "June 6, by cash, $3.00."

Q. Then, right while your wife was lying there and all these Doctors were attending her, you took time off long enough to send a check for $3.00 to pay for flowers sent this girl; is that right?

A. It did not take much time to write a check.

I have no recollection at this time of ever mentioning or talking about divorce in any letter.

Q. Then, what did you mean when you wrote in this
445 letter to Grace that, "If they have the letter in which I mentioned divorce, make light of it, and pass it over."

A. I had no recollection of any letter, and, if such a letter is in existence I should like to see it.

I have no recollection that I ever talked about divorcing my wife to marry the other girl.

Q. Do you deny you made it?

A. I have no recollection.

. . . . . .

Q. May you have written such a letter?

A. That is possible.

I had no trouble with my wife while she was sick. I had not done anything that had made me afraid. Nothing at all.

Q. You were perfectly willing that Grace should testify to the truth, and nothing but the truth, to the grand jury in regard to anything that happened?

A. I was trying to protect her from notoriety in connection with the case.

I believe that was correct that I wrote her on the Saturday after my arrest and told her to make as little as possible of everything that happened up to our engagement. I did that because I was trying to save her all the notoriety that I possibly could. That was the only reason.

Q. Then, why did you say in the letter that you wanted to do that, because you were fighting for your life; why did you make that statement in this letter, that you were "fighting for your life"?

A. Is that in connection with the same statement?

Mr. Brewster: All right I will read it: "It is, of course, silly and absurd as I guess I wrote you, the agents stated

that I made love to you prior to Mrs. Shepard's death, that I proposed to you before, that I spoke about getting a divorce, and that you said they say they have your letter to me that it was against your religion, though you are not a Catholic. If they have such a letter, don't know where it came from, unless it was stolen before the Commanding Officer sealed my room as they stated I had been watched for two months. Now, I denied all of this, dear, told them there was no motive and no crime; that we had corresponded some prior to her death, but that we were not engaged until I gave you your ring in October; that I had not proposed to you prior to her death. I hope, dear, all this corresponds with what you told the Agents at your interview. If not, tell me, dear so I will know, as they are depending on the motive, you, sweetheart." You wrote her that, did you not?

A. I did.

Q. And that was to protect her?

A. Absolutely.

Q. Important to her, or to you?

A. I wanted to know where she was standing.

Q. How would that protect her reputation by letting you know?

A. Well,—I do not know myself just how that would; what I meant by that, I had only in mind to protect her from this notoriety.

Q. All right. Then, the next day you wrote "I don't repeat darling, what I wrote you yesterday about what I hoped you could and would say in your testimony; only want to add that, if they ask you about that letter"—Now, 446 what letter did you refer to?

A. I was probably referring to the letter of the day before.

Q. —"If they ask about that letter, if they have such a thing, in which divorce was talked of, to say, Oh, that didn't mean anything, that was just talk, I know he didn't mean it; in that way, or something like that, you will know, dear, in your judgment your good common sense, and in above all in your love for me what to and how to say it." Was that referring to your letter of the day before?

A. It probably was.

Q. So, when they asked you if they said anything about the letter I have just read in which divorce was mentioned,

you were referring to a letter written the day before this was, or on March 12, 1929; is that right?

A. To the best of my knowledge that is correct.

Q. And you mean to tell the jury that, when you say, "If they have such a thing, I do not know how they got it, where divorce was mentioned, say I did not mean it" that meant the letter of March 12, 1929?

A. To the best of my knowledge. As I stated I have no recollection of any letter or any discussion of divorce with Miss Brandon.

There is nothing in any letter in which I told her I would marry her if I could get a divorce.

Q. But you spoke of such a letter?

A. I was just referring to such a letter.

If you have such a letter I should like to see it.

Q. Why were you thinking it necessary to instruct her what to say in her testimony?

A. I talked this over with my attorneys, and they instructed me to write such a letter.

I put in the quotation marks around the part in the letter quoting just exactly what I wanted her to say when she got before the grand jury and there had been nothing between Grace and me until after the time of my wife's death only admiration and friendship. I did not say she wrote sweetheart letters to me. I have not refused to have any letter turned over.

Q. Now, you say you and Grace were not engaged until October?

A. No, it occurred sometime after July.

. . . . . .

It was sometime after July that letters were written
447 and an engagement was made sometime along there, the exact time I do not recall. I said she received her engagement ring in October and we were engaged in October, but I did not say when.

Q. You told Grace you had told the officers you were not engaged until October.

A. I do not recall about that.

Attention was called to portion of letter of March 18, and he said I did not consider it an engagement until the party had received an engagement ring. I do not recall when I did first talk to Grace about marriage. It was sometime after July as nearly as I can recall.

Q. And you had never thought, of course, about any engagement ring in June, 1929, for Grace?

A. Not that I can recall at this time.

I lived at Fort Riley at that time.

Q. What were you doing in June, 1929, talking to a jeweler in San Antonio, talking about fixing up your engagement ring, if you had no talk with Grace about it?

Mr. Class: Just a moment, I do not recall that testimony.

A. I do not recall anything of that kind at this time.

In the letter shown me Government's Exhibit 43, written on September 24, 1929, to H. L. Murray, care E. Hertzberg Jewelry Company, San Antonio, Texas, I imagine I was referring to something that might occur in the future that might require an engagement ring.

Q. You just told this jury you never had any thought of love at that time with Grace Brandon?

A. I said to the best of my knowledge, I never had anything of that kind prior to July.

My wife was buried about June 23rd, I believe.

Q. That in June, the same year which could not have been later than June 30, you were thinking of an engagement in the future?

A. I probably was.

Q. Then, when you told this jury you did not have any relations with Grace, except pure friendship, you were mistaken, were you not?

A. Not necessarily so.

I was present at the death of my wife and naturally was grief-stricken. I loved her.

Q. Within a week after that, within ten days after that, within fifteen days after her death, you were thinking of an engagement; is that right?

A. That is possible.

Sometime that evening my wife died I sat down and wrote to Grace Brandon, "Dear Sweetheart: Zenana passed away." I was not carried into another room because I was grief-stricken. McDonald said he helped me.

Q. If you felt so badly over the death of your wife
448 on June 15, how, at the same time, did it occur that you wrote to this girl 2½ hours later, "Zenana passed away. My conscience is clear"?

A. I loved my wife, she did not love me; we had not lived together for six years as man and wife.

Q. All the statements made by your wife, which you claim your wife made, with reference to loving you, were made to you alone?

A. I think we will produce witnesses to that effect—

I said our engagement took place sometime after July. I do not recall why I wrote Curtis McCoskey that it was in September. I told the McCoskey's at the house or on the way in the train that my wife wanted me to get married.

Q. You told them she told you that the last day of her life?

A. She told me that; the last day she mentioned again.

Q. She mentioned it again when she died?

A. Just before she died.

Q. Did you tell her you would do that?

A. I did not.

Q. Did you tell her you already had the girl picked out?

A. I did not.

I got a box at Junction City and the purpose of it was for receiving my mail. The reason I got this mail in the box was because I had other business interests that my wife did not know about.

Q. What were they?

A. Different competitions that I was in, that I was trying to raise some money.

It was not alone for that purpose I got it. The other purpose was receiving letters.

Q. Whose letters?

A. Different letters from different people.

Q. What particular person, do you remember?

A. I received different letters from Chicago and letters from Omaha to that box, as well as letters from Miss Brandon.

I did not really get it to get letters from Miss Brandon.

Grace Brandon wrote me a letter in August, 1929, in which she said "I will tell everyone I am engaged to you since I started wearing my ring. Isn't that what you want me to do, dear." I said I was engaged sometime after July, the exact date I do not recall.

449 Q. You never saw this woman from July 1 or 2, until November did you, of the next year?

A. Of the same year.

Q. Yes; and up until that time, up until July, nothing had occurred between you, no word of love had been spoken?

A. To the best of my knowledge and recollection no such word was spoken.

Q. And yet, she was writing you in August, August 27, that you and she became engaged.

A. We became engaged, as I told you several times, sometime after July.

Grace and I had a serious quarrel along in the spring of 1930. It was more serious than the other. The quarrel was over finances and it grew out of this wedding tour. I am 59, Grace is 24 or 25.

Q. —I will ask you, call your attention to the letter of March 12, 1930,—when you said, "I took a sleeping powder at 10:30, went to bed to read for a few minutes, kissed those dear lips goodnight and slept until two, when, being wide awake and my brain seemed ready to burst from thinking, took another, and slept till five. What a blessed relief they give you, to put you to sleep to blot out those torturing thoughts that seem to press on you so". What did you mean by that?

A. I was referring to the quarrel.

Those were the torturing thoughts that were pressing on my mind that required me to take two sleeping tablets in order to sleep. We also had a quarrel when I went down there in November. That was made up. We had a quarrel over Major White. It was patched up partly and partly after I returned. I made arrangements to buy her an automobile at that time. I made arrangement after I returned to Fort Riley.

Q. Then, in November, when you got back to Fort Riley, you said, "It has been a lonesome day, dear, and will be glad to get to work, if they will let me, for hard work and being busy will help me from some thoughts I want to forget if I can." What were those?

A. Those were the thoughts of this quarrel we had there in San Antonio.

Q. And not of your wife?

A. I had no bad thoughts of my wife, at all.

Q. You had not any thoughts of your wife, at that time, had you?

A. I had nothing to make me want to forget.

I have no recollection of writing Grace a letter that
450 my wife had agreed to get a divorce and was goin to Reno and the next day wrote she backed out.

Q. Will you deny it?

A. If you have such a letter, let me see it.

Q. I am asking you, do you deny that letter?

A. I can say, absolutely, I have no recollection.

When I was down there in November, 1928, I gave Grace this bracelet.

Q. How did you happen to give a lady, a girl some thirty years younger than you, a bracelet, a piece of jewelry?

A. Is it unusual to give a friend a piece of jewelry?

When I got back I sent her a canary.

Q. Is it unusual for a married man to send an unmarried girl a canary?

A. She asked me for one.

That is the reason I gave it. When I was down there in June, 1929, I believe I took a bracelet down, or something of that kind; I do not recall right now. If I took it at that time I must have taken it down from Fort Riley. The gold necklace or beads I took down did not belong to my wife; that was my own personal affair, given me by patients in the Philippines. My wife never wore it, she never wanted it. I gave her the mesh bag sometime afterwards. My wife did not request, when she died, that I send the mesh bag.

Q. Did she tell you what to do with it?

A. She did not, it belonged to me.

I sent the mesh bag to Grace I do not know how long after my wife's death. I do not recall whether that was when we were engaged or before. One of the stones in the engagement ring belonged to my wife. It has also belonged to my first wife too.

Q. You used this stone for three engagements?

A. I had.

When my wife took sick I thought she had taken something in the nature of poison alcohol. I have been a physician since 1896. I was a general practitioner part of the time. I know medicines generally. When my wife collapsed I thought the condition I found in her was by reason of some bad liquor.

Q. After you had gone out of the room with the sandwiches you heard the fall?

A. She had been asleep on the lounge for some time.

Q. That is what I say; it was at that time, or about that time, you thought she had taken the bad liquor?

A. I did not see it; I do not know when she took it.

451 To relieve her I put her on the bed and immediately called a physician.

Q. You are a Doctor?

A. Yes.

I did not tell the psychiatrist that I thought she had wood alcohol, liquor like wood alcohol, I said it might be the result of bad liquor. I do not recall making a statement to Mr. Caffrey in which I mentioned I thought she might have taken some wood alcohol. I did not use a stomach pump on her. I did not have any stomach pump there; I called the physician immediately. There probably was a stomach pump at the hospital. There is an emergency ambulance always at the hospital. I made no effort to call it. I was not thinking of bichloride of mercury. I do not know that if bichloride gets into the stomach and stays there twenty minutes nothing can save the patient. My wife was very depressed.

Q. And did you think, at that time, she might have taken something purposely?

A. No, not at that time; she was ill but I did not at that time.

I do not recall that I thought that or had any idea of that shortly afterwards.

Q. You knew her condition, and I believe you testified you saw her standing by her table with a solution of bichlorid of mercury?

A. That was after the doctors had begun to treat her.

Q. Did you make any effort to take it away from her, where she could not get it.

A. No.

Q. Did you not think it rather strange to leave that bichlorid of mercury where a wife in the condition you portrayed yours was to reach it?

A. That solution was not there at all times.

Q. What?

A. That solution was not there at all times.

Q. You testified that is where it was?

A. I did not say it was there at all times; I said it was present on the table.

Q. It was only put on the table when it was being administered?

A. No, I have seen it other times?

Q. When no one was there?

A. When no treatment was being administered.

Q. What did you do, take it away?

A. No, I did not.

Q. You left it right there, did you not?

A. I saw it on the table.

Q. You left it there, did you not?

A. I had nothing to do with leaving it there; it was put on the table.

I did not think about her killing herself at that time. I never saw any indication that she had drunk any bichloride of mercury while I was there out of this solution. So far as I know she took this mouth wash right along. She discontinued one time because of the taste, and I bought her some lavoris but Major Rose insisted that the lavoris be stopped and the bichloride of mercury be used and so far as I know it was used.

Q. I will ask you if in your statement made in response to questions asked by Mr. Caffrey if you were asked this question? "Did she take any of those army cc. pills?" and you said, "Not to my knowledge during her illness; not to my knowledge did she take anything referring to medicines that had a mercury content. After she was sick, she
452 complained of the mouth wash the Dentist was giving her; it was a bichloride solution, and she said it nauseated her and asked him to change it; and he said there was nothing in the world that would relieve her as quickly as that, and he then gave her lavoris."

A. I do not remember making that statement and I refused to make that statement.—When I thought of things during the night, I made a discrepancy in the statement, and I refused to sign it.

They offered to let me correct the statement at the time. I told them I would not do it except in the presence of an attorney.

Mr. Brewster: Take that statement and pick out what was wrong about it.

A. There are a good many things wrong with it.

Q. Doctor, at the time they were asking you these questions, you did not have any suspicion that you were under suspicion; there was no reason in the world why you should not answer these questions truthfully and correctly?

A. As far as I could, correct.

Q. If you had done that, why did the fact that you found out you were under suspicion make you want to change any answers?

A. It did not, the fact I was under suspicion, make me want to change any answers, at all; I said the next morning that I had in thinging over the night made discrepancies; likewise, that I told things which were not true, which had nothing to do with my being under suspicion.

Q. Did you say this: "Now, Major I am going to ask you these questions; did you on any occasion obtain from the Dispensary at Fort Riley, Kansas, any bichloride of mercury tablets? A. No sir; none that I know of." The death of your wife, or what caused her death, could not have influenced your answer to that question?

A. It did not.

It is a common thing for all physicians to carry bichloride of mercury in their emergency kits.

Q. Then, the natural thing for you to say, when you were asked if you carried bichloride of mercury in your kit, was to say "Yes", because all Doctors did it.

A. Yes; and I explained to you that, when those questions were asked, that I was referring to medicines that I carried for emergency purposes, and not that I was carrying for my own use or for my own applications; local applications to patients; I was referring to the things given out to patients.

Q. You were asked: "Did you ever carry any bichloride of mercury tablets in your emergency kit?" and you said, "I do not recall that I ever had any." Those tablets you gave out to anybody you gave out the same kind?

A. I never gave out any bichloride of mercury tablets to anybody.

Q. Why did you distinguish between what you gave out to somebody and what you carried for your own use?

A. I was not distinguishing between what I gave out to somebody, and about what I used for my own use, or what I was carrying for my own use.

Q. You say, definitely, you never had any, and you say, "I am almost positive I never had any, because I had no occasion to use them?"

A. That is one of the reasons why I refused to sign the statement the next morning, because I realized I made statements there that were not true.

Q. Then this question was asked—then your attention was called to this common practice, and you say to that, it was asked you "It is a very common poison for any Army Surgeon to carry, isn't it?" and you answered "Well, you see, I only

carried supplies for emergencies, because we could write a prescription and they could go to the dispensary and get what they wanted. I carried aspirin, calomel and the like."

A. That simply bears out just what I have been telling you.

. . . . . .

Q. Then, this question was asked you, "Major, please state whether you ever drew any bichloride of mercury tablets or mercury bichloride tablets, from the dispensary or from
453 the Pharmacist or anyone in charge of the division at the Hospital, at Fort Riley, Kansas, where mercury bichloride tablets are kept, and who could furnish them to you? A. No sir; no, I never obtained any."

I made that answer as I told you I had forgotten all about what I had for my personal use, and that is the main reason I refused to sign the statement the next morning without its being corrected. I would not make a statement except in the presence of the attorney. My wife did not pawn a ring to raise money to send me to this flying school.

Mr. Brewster: Q. You say your wife did not love you. She pawned a ring to raise some money to send you to this flight school?

A. She did not.

Q. Are you positive of that?

A. I am positive of that.

Q. Did you know of her writing her brother on January 11, that she had done this?

A. No, I did not.

Q. You had had some trouble over a courtmartial, had you not, and had received some reprimand—

Mr. Class: Just a moment; I did not get that.

Mr. Brewster: In January, 1928.

Mr. Class: Just a moment, in January, 1928?

Mr. Brewster: Yes.

Mr. Class: Now, may it please the court, anything away back in 1928, in January, 1928, in connection with some military affairs, or some matters that somebody else wrote to him, or his wife wrote to him, is immaterial.

Mr. Brewster: He claims he was there in November, 1928.

Mr. Class: I understand, what his wife wrote him is not material.

The Court: I understand the question to be in regard to some court martial in January, 1928.

Mr. Class: Some letter counsel has got in his pocket, or waving around in his hand—

The Court: Refer back to the court-martial, and see what the question was.

(Last question read as above recorded.)

The Court: Do you object?

Mr. Class: Certainly we do.

The Court: All right; state your objection.

Mr. Class: Object to it, because it is immaterial, and, as I understood it from the statement of counsel, it has something to do with a letter Mrs. Shepard wrote.

The Court: Is that your objection to this question?

Mr. Class: Surely; incompetent and immaterial.

The Court: Overruled.

Mr. Class: Save an exception.

A. No; I had no trouble over a court-martial.

Mr. Brewster: Q. You were, about that time, confined to quarters?

A. I was never confined to quarters.

Mr. Kagey: Just a moment; we object to that, for the reason that it is an attempt to ask about something that has nothing whatever to do in connection with this case, and an attempt in an indirect way to slander this witness.

Mr. Brewster: He has answered he was not.

Mr. Kagey: I know, he has answered he was not; but you pursued the inquiry, and these questions tend to do that, regardless of how he answers.

454 The Court: Of course, a witness may be asked, on cross examination, anything that might test his credibility.

I borrowed some money from the bank for the funeral expenses. I also got $400 from McCoskey for the cremation; he offered that money.

Q. You never paid that back, that $400?

Mr. Kagey: Wait a moment; we object to this as absolutely immaterial, incompetent, and not within the issues of this case, not tending to prove or disprove any issue in this case.

The Court: He was to pay back some money; is that the question?

Mr. Brewster: Yes.

Mr. Kagey: I should like to be heard on that at some length, if your honor thinks there is some question about it. There are cases about it.

The Court: I do not know. If a man borrows money, and did not pay it back, it might.

Mr. Kagey: We except to the remarks of the court in the presence of the jury as to this matter.

Mr. Brewster: It is offered for the purpose of showing the relationship, or that he was spending all this money on this girl, when he was still owing money for the wife.

Mr. Class: That would tend to prove nothing at all, whether a man owed money, or did not, or how much, would not affect the issues here, at all, whetner before or after the death.

Mr. Brewster: I will ask him another question.

Major Hawley spoke to me about getting another Doctor. I did not get one because Mrs. Shepard absolutely refused, she was perfectly satisfied with the medical men in attendance. I told Hawley he could get anybody he wanted to. I did not get them, because it was up to him, he was in charge of the case.

Q. Did you tell him you would stand the expenses?

A. No question of expenses ever came up.

Q. Why did you not get then when you saw your wife's condition, and get somebody in?

A. Mrs. Shepard absolutely refused, and fought me every time I tried to get other Doctors in; she said "There are too many Doctors here now."

We had a psychiatrist, and an ear Doctor, and a mouth Doctor, Major Hawley and Major DuFrenne.

Q. All this time they were telling you they did not know what was the matter with this woman?

A. This was sometime along in the case; Major Hawley thought her condition might be due to some liver trouble, or her mouth condition might be due to her teeth.

Q. What did you think her condition was due to?

A. I always thought it was due to bad liquor.

Q. Did you think the hemorrhages were due to bad liquor?

A. I said, at the start of this.

Q. When the hemorrhages came, what did you think?

A. I did not know what was the matter.

455 I knew bad liquor would not cause the hemorrhages.

I talked to Major DuFrenne the night after the autopsy as he sat in my quarters. He told me that they had found some ulcerations. He did not tell me, none of the men told me they had found any Vincent's Angina.

Q. Now, Doctor, you had no purpose in going to San Antonio that was connected, in anyway, with Grace Brandon?

A. That was only a side issue.

. . . . . .

Q. What do you mean by a side issue.

A. I mean, I went down there for the purpose of trying to apply for an exchange of posts.

I do not recall that I wired Grace the day my wife's body arrived in Los Angeles; I wrote her. Before I got there there was no love between Grace and myself to the best of my knowledge. On June 29 I wired her "Miss Grace Brandon, 2604 South Presa St., San Antonio, Texas. Will phone on arriving at Hotel, probably about ten. Must see you tonight: Love, Charlie." I sent that from Waco. That was about four days after the burial of my wife I wired and signed it "Love, Charlie".

Q. Why, if your object in going to San Antonio, was to inquire about the flying position, and she was a mere side issue, did you wire her that you had to see her that night?

A. I only had a day and a half—

Q. What were you going to do with Grace Brandon if your wife had recovered? How were you going to take care of that affair?

A. There was no affair to take care of.

Q. You had letters back and forth, you were writing her while you wife was sick, and you were addressing her as "Sweetheart"; what were you going to do in case your wife recovered? What was to become of Grace?

(No answer.)

I was told by Major Hawley on the 12th of June that she was a damned sick woman and could not get well. On the 12th of June I dictated a letter for Mrs. McCoskey to write to a Colonel for my transfer to the air service.

Q. Yes, sir, and you mentioned Brooks Field?

A. I had been trying to secure a position for a long time.

The reason I wrote it two days before my wife died was that I had been trying right straight along; Mrs. McCoskey herself offered to write a letter for me to General Mosley.

456 Q. Did you intend that your wife would not know the flying field where Grace Brandon was if she recovered?

A. She did not know herself where I was going to be stationed.

Q. When you wrote this letter for Mrs. McCoskey to sign you knew at that time your wife would die?

A. I was told by Major Hawley—

Mr. Class: Let him answer the question.

Mr. Brewster; Q. You felt sure of it?

Mr. Class: Just a moment; I ask that this witness be permitted to answer.

Mr. Brewster: Read the question.

(Last question read as above recorded.)

Mr. Brewster: Q. —that she was going to die? Your anxiety was to get back to Grace Brandon?

A. It was not.

Q. You had not given it a thought?

A. I was not thinking about her when I applied for the Air Service.

Q. How did you mention Brooks Field?

A. One reason I mentioned Brooks Field was this: They wanted a man in the School of Aviation Medicine, that was experienced in the examination of diseases—

Q. You had no other reason?

A. Yes; if I got that position, I wired for my wife to come down.

Q. You do not have such a wire?

A. I do not which?

Q. You do not have that wire?

A. (Continuing) I had wired Mrs. Shepard from San Antonio, in regard to this position, where there was a position, getting an exchange between this other officer and myself, and asked if she could take care of things at the other end, if I secured that other position. That was while I was in San Antonio about December 1. Mrs. Shepard replied for me to go ahead, by all means; that she would take care of the packing at that end.

Mrs. Shepard was very willing to go with me. She packed up.

Q. And moved down to San Antonio, just because you wanted her, and had a better place?

A. Because I was getting an increase in pay.

I did not tell her about Grace. I did not ever tell her about Grace. After I wrote the letter for Mrs. McCoskey to go to General Mosley I do not recall if I asked Mrs. McCoskey if she sent it. I do not recall further if I asked her on the

way to buy the casket. I have no recollection one way or the other. I did not tell the undertaker that I wanted a cheap casket because Mrs. Shepard was to be cremated. I do not recall that I particularly mentioned Brooks Field in this letter I prepared for Mrs. McCoskey to sign.

Q. Look it over and see.

(Witness examines paper.)

Q. You did refer, did you not, to Brooks Field?

A. I had in mind such a station as the School of Aviation Medicine at Brooks Field, Texas.

When I saw General Ireland I did not ask about Brooks Field. General Ireland testified that I asked for a transfer to the Air Corps, and later I asked for the station
457 hospital at Fort Sam Houston. That was about three or four miles from Wylie boarding house, and nine or ten miles from San Antonio. I do not recall writing a letter to Grace Brandon on July 21, 1929, which you have shown me out of the Kansas City Star, Sunday, December 14 in which I said in that letter to Grace Brandon, "Do you wish you were in my arms today, dear?" I may have enclosed a card at that time to her and a box of candy in which I said, "My Sweetheart Wife." There is nothing in that to show we were engaged.

Q. Nothing in "My Sweetheart Wife"?

A. Nothing at all.

I wrote on May 8th to Grace Brandon and said "I mailed you yesterday an eight page letter enclosing copies of some of the many letters received, so that you could understand my side of the case. I am enclosing copy of a letter received yesterday, and have added to it extracts left out in tthe copies you received. Have asked you to burn it, dear. You know why.

Q. Why did you want it burned?

A. Just the same explanation as to the letter; I had talked this matter over with my attorney, and he told me to tell Miss Brandon to destroy the letter, because of the danger of it falling into the hands of the detectives, and would cause her a lot of notoriety, which I was trying to spare her from.

I was married in the fall of 1916 in Los Angeles and went from there to San Diego on my honeymoon. The next morning under the bathtub I found several whiskey flasks. I say my wife had had those and had been drinking from them. I was with my wife. It is 120 miles from Los Angeles to San Diego and about a four hour ride.

Q. What shape was your wife in, as to being drunk or sober in the morning?

A. She had been drinking during the night.—

Q. She drank three or four flasks of liquor that evening?

A. I did not say she drank three or four flasks of liquor that evening.

I said I found three or four empty flasks under the bath tub. My wife acknowledged she had them. I do not
458 know that she brought any empty liquor flasks with her.

Q. Do you mean to tell the jury on the day of your honeymoon, she drank, without your knowing it, three or four flasks of liquor?

A. I did not see; I did not know it.

I saw her drink it, I saw her take one drink.

Q. Did you see her drink the first flask?

A. Not all of it.

They were either pint or half pint, I do not recall. I did not say five pints.

Q. How many?

A. Several whiskey flasks, under the bath tub.

I cannot tell whether she drank three or four flasks full. I was not with her all the time. It is possible she could carry three or four half pints without showing it at all. My wife told me she did not love me.

Q. I desire to call your attention to the statement you made to the Department of Justice men, and ask you if this question was not asked and answered, "You loved your wife, did you not, Major, and there was no one else between you and her? A. Absolutely no one." You answered that?

A. I did.

Q. "Q. And your wife loved you? A. Yes, sir." You answered that?

A. I did, to them.

Q. "Q. She was true to you, and you were true to her? A. Absolutely."

A. That is correct.

Q. Now you say that was not true?

A. I did not say it was not true.

Q. That part about your wife loving you?

A. I said, I told you Mrs. Shepard said she did not love me.

Q. Did you state she did love you?

A. I did to them; —that was not true.

The evening my wife took sick and I found her on the floor I asked her what the trouble was, and, as nearly as I can recall, she said something about not being able to see. I asked her what she had taken, and she said she had taken something she had in the evening. She said, if I remember correctly, she said something about, "I am drunk" or words to that effect.

Q. I will call your attention to the statement you
459 made to the Department of Justice men, and ask you if this question was asked you: in asking you what the condition was there, you said "Well, she ate sandwiches, and she said that they did not taste very good, and she did not eat much, and I was busy writing on the table and I went into the dining room and sat at the table where the typewriter was, and the first thing I heard was a crash, and I jumped up, and she was off the sofa, and she was down beside the door, and she appeared dazed, and I ran over to her and asked her what the trouble was, and she said she did not know, she could not see; and I carried her to the bed, and talked to her and then I called one of the ladies." You made that statement?

A. Part of that is correct, yes.

Q. What is wrong about it.

A. As I stated to you I called attention to inaccuracies in that statement which after thinking over during the night I told you I would not sign the statement or told Mr. Caffrey I would not because of those inaccuracies.

Q. He told you to correct them?

A. He asked me to correct them.

I absolutely refused except in the presence of an attorney. The inaccuracies are as I remember that it was sometime after Mrs. Shepard lay down on the sofa before I heard this noise and as I remember Mrs. Shepard did say to me, when I asked her what the trouble was, that she guessed she was drunk. It was my recollection she told me she did not know what was the trouble, at that time. It must have been fully an hour, probably longer between the time my wife ate the sandwiches and the time I heard the crash. I do not recall what time Mrs. Skow got over. It was somewhere near seven or eight o'clock. I cannot say positively it was just a few minutes before seven and not later than five after. I do not know if my wife was on the road to Junction City either coming or going after six o'clock that night.

Q. Would you say she was not?

A. I could not say, one way or the other.

As nearly as I can recall she got in sometime between five and six. I said she was there probably about an hour or more. I suppose I said to the Department of Justice if it is in the statement, that my home life was normal.

Q. That was not correct?

A. Men do not usually discuss intimate family relations with everyone who asks.

I understood at that time that I was being quizzed about the relationship between myself and my wife. In putting in some of the inaccuracies in the statement it was for the purpose of protecting my wife's name and on some of the statements to protect Grace Brandon.

Q. You had them both in mind at the same time, in making the same statements, did you?

A. That was perfectly all right.

I said my wife had been taking morphine. She told me she had taken it for some time. I did not know she was an addict until I caught her taking those tablets.

Q. You are a physician: Do you tell this jury that you cannot tell when you see a person, and around them as intimately as you are with your wife, whether they are addicted to the use of opiates or morphine?

A. I did not say I could not tell it.

Q. Did you tell it?

A. Not altogether; the fact she was under the influence of liquor, or chronic alcoholism, would mask some of those symptoms.

I do not know it to be a fact that an alcoholic does not use morphine or a person addicted to morphine does not indulge in alcohol to amount to anything. I did not know anything about whether my wife was a morphine addict and a liquor addict. At the time I was making the statement to Caffrey, I naturally had in mind the fact that liquor had something to do with my wife's sickness. At the time of the statement my recollection was that my wife told me she did not know what was the matter. I stated in answer to this question "At the time what did you think was the cause of this unusual condition of your wife?" "I thought she had got hold of some bad liquor; that is what I told Major Strickler."

Q. What do you mean by bad liquor?

A. Something with wood alcohol, something that would effect her eyes.

I do not recall using the words "wood alcohol". I did not know what was in this liquor. I imagined I suppose when I made the statement she was taking something in which there was wood alcohol in some of this bad liquor. I am a physician of long practice and know wood alcihol is poison and that it effects the eyes. There may be poison in liquor. As nearly as I can recall my wife said she had taken something in the evening and I thought it might have been poison liquor. I carried her to the bed and laid her on it and got a psychiatrist and he is a physician. I did not try to
461 get a stomach pump or get the liquor out of her. Mrs. Shepard had been a chronic alcoholic for years and the fact she was drinking again did not indicate to me she had taken any acute poison.

Q. Why did you say in your statement that you thought she had taken wood alcohol?

A. I do not know, except she had gotten hold of some poison liquor, possibly wood alcohol, or words to that effect.

Q. Even on that possibility, would it not have been natural to call somebody and get a stomach pump and get it out of her system?

A. I called the physician immediately.

Q. Doctor, you knew, if this woman had mercury, and she was let remain thus for twenty minutes, that all the physicians under heaven could not save her.

A. I did not.

I do not know anything about the mercury you are talking about now. I did not know about her taking the mercury. She had no symptoms of mercuric poisoning. My wife had a horror of an autopsy.

Q. She did talk to you about being cremated?

A. She talked to me about different forms of burial, at different times.

It is possible that I did meet Major DuFrenne sometime about June 1st, and tell him that, in case anything happened to my wife I did not want any autopsy. At that time I did not know my wife was going to die, only what she said herself.

Q. Well, but you were a physician; she could not lie there and die, just because she said so, could she?

A. No, I do not know what brought up that conversation.

Q. Do you mean to tell this jury the only reason you thought your wife was going to die was, while she was lying there sick, Mrs. Shepard told you that?

A. No, Mrs. Shepard told me that hundreds of times before she was taken sick.

Q. That is the only reason you can give for telling Major DuFrenne that, while she was lying there sick, before you knew whether she was seriously ill, that, if anything happened to her, you did not want an autopsy?

A. It is absolutely the only reason I have, or ever told to anybody about an autopsy.

Q. That is the reason you also saw Sergeant Gresser who was in charge of the Morgue and told him there must be no autopsy?

A. I do not recall any conversation with Sergeant Gresser about an autopsy.

Q. That is the reason you told Sawtell to take the body over to Junction City, but that there should be no autopsy?

A. That is the only reason.

Q. You wanted to keep your promise to your wife?

462 A. Absolutely.

I was particular to keep that promise to her.

Q. Now, I will ask you if you did not answer a question this way: "As I stated, she had stated she did not know what she wanted. The last time we talked about that sort of thing, she said 'I do not know whether I want to be cremated, or put in the ground and let the worms get me.' That was her expression, so I was not positive about what she really wanted." Did she tell you that?

A. She did.

We talked over the question of an autopsy many many times and what she wanted done after death but there was no definite arrangement made or definite statement made as to what she wanted done. I testified Major Dye or somebody prescribed calomel and she took it the next day as far as I can recall. As nearly as I can recall in my statement I said that she had never taken any calomel during her entire life's sickness. I made the statement she did not take any calomel the last time she was sick, the last time, and went to bed; the last time she took calomel was several days before she became seriously ill on May 20, 1929, and that was my recollection at the time the statement was made. Major Dye's testimony refreshed my memory as to what he had prescribed

and then I remembered she had taken it the next day. This statement was made about March 17 and of course I was nearer to the time of the sickness of my wife than now.

Q. Now, I want to call your attention to a letter written on March 13, 1930, and ask you if the letter did not contain this clause, and what you meant by it: "We have each other, and everything will come out all right, darling, but if something sudden and unlooked for appears, don't be downcast or too disappointed. Remember that behind the clouds is the sun still shining, and remember your Charlie loves you so dearly." You put that in your letter, did you not?

A. Just let me see the whole letter, and I can tell you.

Q. Yes; read it over.

A. (Referring to paper) Yes, it refers to the paragraph above, if you will just read that.

Q. What is that?

A. "Now, dear, I want you to feel that I am doing everything I can to make our plans for a trip successful. You know the old saying, 'There is nothing sure in this life but death and taxes.' Anything might happen, illness, accidents, or in the Army, changes too numerous to mention. Once I had three changes of station in four weeks. Colonel Halloran has given or, said I could depend upon a month; something may come upt to change that. I'm never sure of orders until I have them in my hand. Now, sweetheart, I don't want
to dampen your hopes, or have our plans crash, as you
463 say, any more than you do, dear. This is the greatest
and happiest event of my whole life, and I hope it will be for you. I am just mentioning these possibilities, darling, for such things have occurred before; don't want them to occur in our case, so please don't feel or write as you did, that I wasn't frank, that I was trying to get out of it all."

Q. And it was that you referred to at the last, when you said, "If anything sudden or unexpected"—

A. Something "sudden or unlooked for appears, don't be downcast or too disappointed."

Redirect Examination.

At the time I went to San Antonio to attend the
464 school the government paid my expenses. After Mrs.
Shepard has passed away, I found among her effects a receipt from a loan company in Omaha, and, not knowing what it was, I wrote to them and asked if Mrs. Shepard had

an account there. They replied she had, and that there was due somewhere about $280 on some account of that kind, on some rings she had pawned. I borrowed the money and redeemed the rings. I redeemed them shortly after Mrs. Shepard's death. I cannot recall the exact date. I noticed she was not wearing her rings and asked why she was not wearing rings and she said she could not wear them because of driving the car, they interfered with her gloves. Once in a while she had one or two rings on. I did not know what kind of rings they were until after her death and after getting the report from the loan company. I took them to a jeweler and he said they were crystals. They were imitations instead of the original rings. While I was attending school I was on the payroll of the Army. I sent half of my check each month to Mrs. Shepard. I wired Mrs. Shepard telling her that there was a possible chance of a mutual exchange. I solicited Mrs. Southard and Major Southard that they communicate with Mrs. Shepard respecting a transfer to San Antonio. I showed the telegram I received from Mrs. Shepard to Major Glenn and Major and Mrs. Southard. I never said anything to Major Hawley or any other person that I could not afford or that I would refuse to pay for a specialist attending my wife. There was no expense attached to calling in a physician to see a physician or his family. By reason of a brother physician, the code of ethics; physicians do not charge one another for attendance upon themselves or their families. As a specific instance, Doctor O'Donnell never sent a bill for attendance upon my wife. I did not know what caused the hemorrhages of Mrs. Shepard. From my experience in the Army it is customary to send female patients who have passed away to civilian mortuaries, rather than to an Army hospital morgue.

Recross Examination.

Sergeant Gresser was in charge of the government
465 morgue. I have no recollection of ever saying anything to Sergeant Gresser about the holding of an autopsy. I asked my wife before I went down to San Antonio in regard to going down with me, and toward the latter part of the course, when this matter came up in regard to the possibility of mutual exchange, I wrote to her and asked her if she could arrange things at that end. That was the latter part of the course which would be the latter part of Novem-

ber or the first of December. I met Miss Brandon about November 1st. It was after I met Miss Brandon. When I got back to the post at Fort Riley, Mrs. Shepard was very much depressed, quite hysterical, had gloomy, moody spells and as I stated was afraid she was going to be like her mother and wanted to be assured she would not be. She improved some after I got back. At times she drank very heavily. Her mentality was all right. She was drinking some. I could not say how much she was drinking between May 10th up to the time she was taken sick. She worked and sewed at various times. In these moody and depressed spells she was continually telling me she did not want to live, and was going to die.

Q. It was before May 10 that she had become a dope addict, was it?

Mr. Class: May it please the court, the witness never said that.

Mr. Brewster: Yes, he did.

Mr. Class: He testified to the facts.

The Court: This is a question that is asked this witness, and the witness may answer.

Mr. Class: May it please the court, counsel is assuming something—

The Court: The witness may answer the question.

Mr. Class: We save an exception.

The Court: All right; save your exceptions, and you may state your exceptions. Don't argue about it; your argument was not proper on this matter.

Mr. Class: Very well; save an exception.

A. I have not said Mrs. Shepard was an addict; I said I caught her taking morphin.

Q. You say, you discovered her using it quite frequently?

A. I told you she told me she had been using it frequently.

Q. Was that May 10, or afterwards?

A. I cannot recall the date.

My wife did not say whether she was taking this opiate hypodermically or by mouth. She swallowed those tablets that I saw her take. I could not say how many. Her appearance got worse, her eyes got to looking bad when she was drinking, and then to all appearances she would entirely recover from it. At the time she would show the physical signs of the effect of the liquor on her. After that only just in

loss of weight and loss of appetite. The government's
466 Exhibits 6 and 7 are pictures of my wife. They were taken at Omaha. I do not recall that she had been drinking every Sunday or that she had been doing that at the time these pictures were taken. I did not say she was drinking every Sunday; that was testified to by somebody else. Mrs. Shepard had been drinking off and on, whether it was every Sunday, I cannot possibly say.

Redirect Examination.

I could not give an estimate of the population of San Antonio.

Mrs. William Southard was called as a witness on behalf of the defendant and testified as follows: I am the wife of Major Southard who testified here the other day. I was married to him in June, 1917. We were stationed in the Philippines at the same time that Major and Mrs. Shepard were there. I first met Mrs. Shepard about the year 1921 at social affairs at Fitzsimons hospital. We were there with the Shepards, we went to Denver I think in 1919. We left there in July, 1922 and traveled with the Shepards to the Philippines on the same boat. Her mother accompanied them. Mrs. Shepard returned to the United States on the same transport with her mother. Her mother had become violently insane on the way over. She got back to the Philippines in November or December. During my acquaintanceship with Mrs. Shepard at Fitzsimons, I did not notice that she drank intoxicating liquors and did not see her under the influence of them. I was not closely associated with her then. I only met her at Fitzsimons Hospital once or twice at social affairs in the afternoon and that was just to exchange greetings with her. I was Mrs. Shepard's only intimate friend in the Philippines. From the time of her return from the States until we arrived in San Francisco, in 1924. We were there two years. I could not say that she used liquor on the way over. I did smell her breath but I had never been associated with people who drank and I never paid much notice. I went on a trip to China with her about 15 months after I reached the Philippines. We went with Major Grant and Mrs. Grant. There were four in the party. We took a transport leaving Manila sometime late in October, and went to Chingwangtau,

and from there we took the train to Peking. We were
467 there nine days. From there we went to Tientsin and
then to Shanghai. We were in Tientsin just one day.
We remained in Shanghai ten days. The trip lasted about a
month. Mrs. Shepard and I traveled together and shared the
same room. Major and Mrs. Grant had another room in the
same hotel. At Peking we stopped at the Wagon Lits Hotel.
When we got to the hotel I observed Mrs. Shepard using
liquor. When we were at the hotel and in her room, Mrs.
Shepard said, "I feel I am taking cold, I think I will order a
bottle of whiskey." This was the first day of our arrival;
so she ordered a pint flask of whiskey from the room boy.
When he brought the whiskey, she poured herself at least
three-quarters of a tumbler glass of whiskey and drank it
down. She brought me about a quarter of a glass she said,
"Take this, it will do you good." I looked at her and said,
"Mrs. Shepard, I could not take a mouthful of straight whiskey
without choking to death," and left it on the table. The next
morning it was gone. I did not drink it. We would each
have a cocktail before dinner while we were staying at the
Wagon Lits. We arrived at Shanghai during the morning.
We went out with Major and Mrs. Grant to tour the shopping
districts. We passed by a store that sold intoxicating liquors,
as well as wares, and so forth, and Major Grant went in and
purchased himself a half-pint of whiskey, a small flask. Mrs.
Shepard purchased a quart-bottle of whiskey. When we re-
turned to the hotel she gave me a drink of whiskey and also
took a drink herself. I never had another drink of whiskey
out of that bottle. I was curious because the bottle remained
on the shelf in the bathroom, the liquid remained the same.
I was wondering why she did not drink that whiskey. Later
I had a suspicion of her drinking alone, and wondered why
she did not take the whiskey. I took the bottle off the shelf
and poured the contents into a glass and it was only water.
We were there ten days. On the second day, Mrs. Shepard
after breakfast, she did not go to breakfast with Major Grant.
Mrs. Grant and myself. She decided she did not feel well.
after breakfast, we went to our room and she said.
468 "I am not going shopping today; I do not feel well
enough." I said, "Would you like me to stay with you?"
She said, "No." I did not insist at that time. When we re-
turned in the evening I saw Mrs. Shepard as I had seen her
so many times in Manila, she was lying in bed, her eyes were

glazed; she had a large, expressive mouth, rather full lips, when she was normal, she was a very good-looking woman, her mouth was her most expressive feature; when she was intoxicated, it hung open in a very disgusting expression. I knew then she was drinking. I slept with Mrs. Shepard, it was the only time on our trip that we occupied the same bed. Her breath was nauseating to me, I could not turn over in bed, I had to lie on my right arm for three nights in bed with her. It was a strong, sickening, alcoholic smell. She did not go shopping at all that day. The next morning when Major and Mrs. Grant came to the room I told them I was not going out, that I was going to stay with Mrs. Shepard. Mrs. Shepard became very angry with me when I suggested staying in with her, so I went with the other people. I went out with the Grants. When I came home that night, Mrs. Shepard was worse than she was the night before; she hardly recognized me or the Grants. Her eyes were very much glazed and with a faraway expression; her mouth was hanging loosely open, and she had a very strong alcoholic breath; she was uncommunicative; she would not speak to me or to the Grants. She never ate for three days while she was in bed. She did not drink while I was in the room but when I went in the bathroom, I looked under the bathtub and the floor was literally covered with empty whiskey bottles. Nobody was occupying that room except she and myself. When we were leaving to get on the boat I thought I would look around; I did, and I found a full flask under the tub. I took this flask and set it outside on the window sill, the window pane was glazed so she could not see through it. We then went to the boat. When the boat was about to sail, Mrs. Shepard came up to me in a hurry, and she said, "I have some money to change." In China, money is not good from one province to another; you have to change your amount of money; you have to have your amount of money changed from each city. She said, "I have some money to spend, and
469 I know it will not be any good," and she said, "I will run over to a lady's shop," which was not so very far from the boat; Mrs. Grant said, "I will also go with you, I also have a little money." They left the boat. They came back just as the gangplank was being drawn up. When we went to settle the hotel bill at Shanghai, we had a bar bill of 34 Mex., which at that time the exchange was 241, and

that was a $17 bar bill. I had not had a drink in Shanghai. Mrs. Shepard was not aware of the fact I knew she drank; I never told her I knew she drank. I said to her, "Mrs. Shepard, this seems ridiculous, to have such an enormous bar bill, especially when there are only two ladies in the party," and I said, "We have not had a drink in this hotel." I said, "I am going to talk to the management about this; this is evidently a mistake." Mrs. Shepard said, "Give me that side of the expenses, and I will settle the bill." She paid the bill. She did not say a word about the liquor. When she left to get her money changed before going on the transport and returned just before the gangplank was pulled up and after she had gotten on the boat, I looked around the stateroom, and she was not present, and I found another full flask of whiskey in the stateroom under her pillow. I did not do anything with that. Before the trip to Peking, Mrs. Shepard and I, as I stated before were extremely intimate. I would run into her house practically every day, or she would come to mine when she was well. I would often go into her house when she did not expect me and find her in this dazed condition, her eyes dazed, her mouth drooping, her breath smelling strongly of whiskey. I also accompanied her on many social trips when she bought several bottles of liquor at one time, and in Manila it was our habit not to pay cash for things, we signed chits for anything, everything we bought; on these occasions, Mrs. Shepard would say, "I am going to pay cash for this, I do not want the doctor to know I bought it." She always called the major "doctor". After I came back from this trip to China, I saw her often when she had been drinking. She was always in bed when she was very intoxicated. Sometime before we went to China, she talked to me about her relations with Major Shepard.

470 Mr. Brewster: Q. Now it is clearly incompetent.

Mr. Kagey: Go ahead. This is part of the conversation.

Mr. Brewster: We object to any statement of that kind.

The Court: You will not consider that, gentlemen of the jury.

Mr. Kagey: What did she say about herself and Major Shepard?

A. She told me she did not love Major Shepard when she married him; it represented a way out for her, a way to help support her younger brother Ted, to help her mother and

help herself, she said, "I thought he was rich, and I married, but I did not love him."

When we came back on the transport with her and Major Shepard, as far as San Francisco I did not have a chance to observe Mrs. Shepard very much on that trip home. At the times I did see her I detected the odor of liquor on her breath. I was living in San Antonio in the fall of 1928. I saw a telegram signed by Mrs. Shepard and sent to Major Shepard about her coming to or going to San Antonio. As nearly as I can remember it was near the end of his stay there. The first line of the telegram was this: "Get the appointment by all means." The next, in substance, was: "I will attend to the packing at this end." That was signed by Mrs. Shepard.

Cross Examination.

I do not know about my husband contributing any money to the major's expenses. I was a very particular friend of Mrs. Shepard. I cannot say what the date was of this telegram. I did not look at the date. I particularly fixed the wording of this telegram because it struck me particularly. Major Shepard came into my house, his face seemed very happy. He said, "I wrote Zenana, this is her reply," and he handed it to me. It was in my own home at San Antonio. At that time I did not know he was playing around with Grace Brandon. I knew absolutely nothing about it. I never heard a suspicion or whisper about him until this happened. He seemed to be very happy when he found out his wife was willing to come to San Antonio. I remember the telegram distinctly. The major that was with us was Major Brook C. Grant, Medical Corps. He is now living at San Antonio, and is stationed there and his wife is there. They did not see her drink. The first time I saw her take a drink was in Manila and the time I spoke of in China was 15 months later. I saw her drink frequently in Manila. Mrs. Shepard had intervals and the time varied. I should say
that when she first came to Manila that her periods
471 of drinking were farther apart than when she left.
Sometimes she would go for a month or more and appear normal. We stayed in China one month. She was in bed three successive days in China. That was the only spree she was on while we were in China that I recall. I testified to her having the floor just literally covered with liquor. I found more than a dozen whisky bottles. As I recall them

they were pint bottles. She got away with six quarts in three days, or two quarts a day. She never left the bed. I did not say she got the liquor from the bathroom; in the first place, I said the empty bottles were in the bathroom. It was an easy matter to get liquor; all one had to do was press the bell in the room and the boy would bring it to her. She drank that liquor but not while I was in the room. I was not there all day. We went shopping immediately after breakfast and would come back and eat lunch and go back and stay until dinner time. My estimation is that she drank two quarters of liquor a day during those three days. She did not have a doctor; she did not want a doctor. We had a doctor with us. She was in such a state she would not even talk to me. Her jaws hung down and her mouth hung down and her eyes were glazed the first day. The second day she was worse. I did not say she drank two quarts of whisky a day, I said I found at least a dozen whisky bottles under the bathtub; she was in bed for three days in a stupor, a drunken stupor; I did not testify whether she drank twelve bottles one day, or twelve bottles in the ten days we were there. During the three days she lived there in a drunken stupor. She drank while she was in a drunken stupor. She must have drunk it. She would lie in bed, her eyes glazed; she would see me, if I attended her and demand a reply; I would give it; but other than that she was uncommunicative. I stayed all night every day. I could not tell whether she drank while I was asleep. The day before she went into that drunken stupor we went shopping some. She went with us part of the time. I cannot say what she drank that day. I do not know the ingredients of cocktails; I am not familiar enough with them to know. I suppose they are intoxicating if one had enough of them. We had one every day before dinner at night. We had the cocktails in
472 Peking, not in Shanghai. I suppose the only reason was we did not want them in Shanghai. I do not remember the day of the week that she took sick. For three nights I never moved off of my right arm her breath was so terrible, all night long. She did not get up in the morning, and showed no animation except when I suggested I would not go out that day, she became angry with me. She did not want me there. When I came back I found her drunker than when I left. She said practically the same thing the next day to me. I do not remember the exact words. The

second day I suggested I stay in with her and help her. She told me she did not want me there. I then went out. The third day the same thing happened. She was in bed the third day drunk. She certainly was drinking during those three days; otherwise she could not have remained drunk. I was and I am, Zenana's best friend.

Redirect Examination.

I shielded Mrs. Shepard and never told any one she was drinking. We were at the hotel 10 days. It seems to me—it must have been just a few days before we left before I found the bottles. Otherwise I do not believe I would have looked under the bathtub when we did leave.

Beatrice M. Weinberg called as a witness on behalf on the defendant, testified as follows:

I am the wife of Major Weinberg, who testified a day or two ago. I met Major Shepard and his wife in the Philippines in 1922, when my husband was stationed at Manila. The Shepards lived about 4 blocks from us. We left there in September, 1923. We saw them once or twice a week at parties. When we were driving around the Luneta, we would park there alongside the waterfront and Major and Mrs. Shepard would come and also park, and the ladies get together and talking, and several times Mrs. Shepard did not come down from the car and so I went over and greeted her and asked her why she did not join us; she said she did not feel well, she was sorry but I noticed she had an odor on her breath of liquor. She would start talking about some parties and then would not finish and start on something else again, and would never finish her conversation whatever she started, and it was not very plain.

473 Q. What was the attitude and demeanor of Major Shepard, on these particular occasions, so far as it related to the conduct of Mrs. Shepard?

Mr. Brewster: We object to that as incompetent and immaterial, and too remote; not tending to prove any issue in this case.

The Court: Sustained.

Mr. Class: We save an exception.

Later we saw the Shepards in Omaha. It was the latter

part of 1924. She always worried about herself being sick, and being like her mother; she told me all about her mother. She told me all about her mother. She told me several times. I would stop at her house in the morning, and I went to the commissary and went to see her and I found several times that she had been drinking, and I saw by her conversation and appearance it was not the same when she was drinking as when she did not. Her eyes were red, and she looked worse, so I asked her why she was worried and what was the trouble; she said she was not feeling well, and she was losing her appetite and losing weight, worried her very much; she did not want to be like that, and always afraid she would be like her mother. She told me that she liked to take a drink and Major Shepard objected to that and he scolded her at times for it, about her drinking; and I told her, "Well, if the major does not want you to drink, why do you not quit, and do not drink? That maybe is what hurts you." She said, "Oh, I do not drink very much." I observed several times that she had been drinking quite a bit, and I thought she could not stand very much more. I could see she could not stand very much more. She said that she would not like to be like her mother; she would rather be dead, and she would not go to a hospital, that being a nurse she knew what they would do. I told her she would not have to worry about that. I had Mrs. Shepard at dinner, because of Major Shepard and my husband going to a lodge meeting near Omaha, and the two of us intended to go to the moving picture show. After I left Mrs. Shepard to go to the kitchen to see if dinner was served, so we could go early, and I returned sooner than she expected me and I saw hr standing with a bottle in her mouth, like a medicine bottle, and I stood and let her finish, and she put it back in her bag, and I entered the room and told her dinner was ready, and I smelled on her breath that she had a drink of liquor;
474 so we sat at the table and during dinner I noticed in her actions that she was dropping things out of her fork and she stopped eating, she said she had no appetite. She said they got along very nicely only at times the major scolded her when he did not want her to drink; scolded her for drinking—because she did drink.

Cross Examination.

At the time Mrs. Shepard had dinner with me she visited with me before I went to see how the dinner was. She visited with me for three-quarters of an hour, maybe an hour. I noticed that her eyes were a little red when she came in. I smelled her breath when she came upstairs and took her hat and coat off. She was perfectly normal then, except a little smell on her breath. I thought it was a little liquor. She held her liquor well. Unless one knew Mrs. Shepard very well, one could not tell whether she had been drinking or not. One could tell it in her expression. She looked worried or feeling blue; she was always happy when she did not have a drink. It was easy for those who knew her to tell she had been drinking. The bottle she was drinking out of that time appeared to be four or six ounces; six or seven ounces; it was a medicine bottle. I smelled it in the room, when you open a bottle it leaves a certain fume or odor in the room. I smelled it after she was through drinking it. I smelled liquor on people many times in the Philippine Islands. It is quite common over there. Everybody that likes it does. I went to picture shows with my husband and this lady. She mentioned several times that she was very much afraid of being like her mother. I did not know anything about her mother personally. She told me about it. She told me she was kept in an asylum. She told me in 1923, they took her out of the sanitorium and she wanted to go to California to see her mother, to enjoy her while she was all right. I did not know that Zenana was corresponding with her mother right along. On a Sunday evening we were over there and she asked me to go upstairs with her, she had something to show me. We went together, and, in the room door, she said, "Wait here," and she went right to the clothes closet, and I heard her take a cork out of a bottle, and heard the noise of the bottle in there, and smelled her breath.
475 There was not a good deal of drinking around that post. She told me she had a bootlegger to bring her whisky, that the major did not know anything about that. I did not see anybody else drink at the fort. She was the only person I saw take a drink at Fort Omaha. I never saw Major St. Peter at Fort Omaha. The picture marked government's Exhibit 7 is a good one. One cannot tell much by a photograph. It is pretty good. It is just as she looked when

she was at Omaha at times. To me she would look very well at times; the fact that she kept herself always very neat and very nice. I do not know if she drank very heavily and to excess in the Philippines. I just was told she had been drinking from morning to night on the ship to the Southern Islands. Some people, some officer who was there told me. Captain and Mrs. Foley were on the trip and Captain Foley was the one buying whisky for her. Every time the boat would stop she would give him money to busy whisky for her; Captain Foley was a friend and not telling Major Shepard about it. I knew Mrs. Allen. I just met her at Mrs. Shepard's house. I did not live at the post at Omaha. I lived in the city.

Cenon Manaloto was called as a witness on behalf of the defendant and testified as follows:

My name is Cenon Manaloto. I am thirty years of age. I knew Major and Mrs. Shepard in the Philippines. I think 1923. I worked for them over there as cook and houseboy for two years, and then came to Omaha with them and did the same work there. I came to Omaha in August and worked for them three years. I quit before they went to Fort Riley. I noticed Mrs. Shepard drinking intoxicating liquors. She drank Gordon gin. Sometimes when she send me to go to drug store or a store what I call a drug store, send money for it. Sometimes she go by herself if she aint got any in the house, and she want to buy herself. Sometimes she drank liquor every other two days or three days. When she been drinking, she dont like to eat. Always stay in bed. She would do that about once a week. Major Shepard did not drink anything as far as I know. They get along all right.
476 When she get drinking she had a red eye, and when she walks she cant any other way the same as when she was not drinking and she stay in bed was two or three days. That is as far as I know. I lived with them three years in Omaha. I was the only servant. They were living in a house by themselves. Major Shepard was sick part of the time. I cant tell exactly how much. Got injection on his stomach. She would drink liquor three or four days, something like that. Would not get drunk for two or three days, four days. I got liquor for her, sometimes send me in the morning, after Major Shepard going to the office or

hospital. I cant tell how much she would drink in one day. Sometimes she would drink two quarts, but I can't tell because she send me in the morning, and send me in the afternoon. I got her regular bootleg whiskey. She would drink by herself. I know she use that what they call paragaric for her breath. I saw her take it. She would get drunk. Oh about all day, two days, can never tell. Once a week, twice a week. She drink alcohol straight. She did not care what kind, so it was whisky. She never complained about the kind of liquor I bought her. I worked for her and the major altogether five years.

Q. During the five years that you worked for them, did you ever hear Major Shepard say an unkind word to her?

A. Well, sometimes when Major and Mrs., they go outside for dinner part, and he find her just kind of whoopee, like whoopee, she look like.

He tried to kill her breath. He never did scold or quarrel with her. I remember when Ted McCoskey and his wife were there on their honeymoon. I saw Ted McCoskey give her a half a quart of Gordon gin. She did not drink it. They had a dinner party that night. The major brought about four ounces of alcohol and gave it to me to make cocktails with the gin before dinner. Mrs. Shepard kept the alcohol out and used the gin for cocktails. I can't exactly say how much she would have to drink before she got drunk, because sometimes she may have one pint of whisky and in the evening send me again for another pint. I would pay a dollar and a half for it. I bought it from bootleggers. I did not have any trouble finding bootleggers to buy it from

Cross Examination.

I am staying in Omaha. I am staying here now. Not
477 with anybody. I do not room at Major Shepard's. I do not know who pay my expense. I go Judge Class. Major Shepard brought me here from the Philippines in 1923, and I am still living here. I served cocktails. The major he did not drink cocktail. He served. We had six people to the dinner. He brought four ounces of alcohol for six guests. Mrs. Shepard drink alcohol straight. I did not see her put anything in it. I can't tell you, I do not know how much she drink at a time; about that glass, small glass. I can't say because I never see drinking, where put herself; I just keep it for her. She drank two pints a day bootleg

liquor. Not every day, every three or four days. That was all the time I was there in Omaha with them. Nobody told me that she drank every day or every two or three days. Nobody except myself.

Q. Were you here when Major Shepard testified she would go for weeks and weeks, at Omaha, without touching a drink?

A. No.

Q. She did not do that; she always was drunk, was she not?

A. Always drunk.

Q. Every time. That is all. You never saw her sober, did you?

A. Well, sometimes.

Q. Did you ever see her sober?

A. Well, I saw her—

Q. You just said she was always drunk?

A. You ask me, always drunk every day, not every day.

Q. I ask you if she was always drunk, and you said yes; is that right?

A. Not always drunk.

Q. Well, what did you mean by that answer?

A. I told you three or four days, she got drunk.

Q. Yes.

A. They get over.

Q. And last for how long?

A. About a week.

Q. About a week?

A. Yes.

Q. You just said every other day, or every day or two?

Mr. Kagey: We object to this as an argument with the witness.

Mr. Brewster: Q. Did you not testify she did, every two or three days?

A. Yes.

Q. Now, you say every week?

A. I did not say every week, I said once a week, get over.

Q. Once a week she would get over?

A. Yes.

Q. You said a momnt ago, she used liquor every two or three days?

A. Yes.

Q. And then stopped, and used it a day or two. Now, what was it?

A. What do you mean?

Q. What do you mean? Did she use it once a week, or twice a week, or three times a week?
A. Three times a week.
Q. Three times a week?
A. Yes.
Q. Then, there wouldn't be a week between times,
478 would there?
A. That is what I tell you.
Q. What did you tell me?
(No answer.)
Q. Did you ever see this woman go two weeks without a drink?
A. Yes.
Q. Did she ever go three weeks without a drink?
A. Yes.
Q. Four weeks without a drink?
A. No, not four weeks.
Q. Why did you tell the jury a moment ago, she drank every two or three days, every week you were there?
A. As well as I know.
Q. Is that right? Did she drink every two or three days?
A. As far as I know, she was drinking.
Q. What?
A. As far as I know, she was drinking.
Q. Is that all you know about it?
A. Yes, sir.
Q. She did drink?
A. Yes, sir.
Q. You do not know how often, do you?
A. About three or four days, I told you.
Q. What?
A. Three or four days, I told you.
Q. Every three or four days?
A. Yes.
Q. It was not every three or four weeks?
A. Every three or four weeks? I did not say every three or four weeks.
Q. What?
A. I did not say that.
Q. You do not know just what you are testifying, do you? That is all.

Redirect Examination.

Mr. Kagey: Q. When Mr. Brewster asked you if she was drinking right along, you testified she was. Did you mean by that, she was drunk all the time?

A. She was drinking.

Q. Well, now, do you mean she got drunk every time she drank?

A. Yes, she drank every time.

Mr. Brewster: Object to that as leading.

Mr. Kagey: Q. She drank right along?

A. Yes, sir.

Mr. Kagey: I do not speak Spanish, and I do not speak English very well, but I—I guess that is all.

Mr. Brewster: That is all. I want to recall Major Callender.

G. R. Callender recalled as a witness on behalf of the government for recross examination by Mr. Brewster. I based my opinion when I testified before in answer to the question of Mr. Kagey in which he said to suppose she had four or five pints of the mouthwash. That is to the best of my remembrance. She would not have gotten anywhere near the amount that was found if she had used less than a pint. The supposition was that in each pint there were two grains. In five pints there would have been ten grains.

Ruth Winchester called as a witness on behalf of
479 the defendant testified as follows:

I am the wife of Captain Russell C. Winchester and stationed at Fort Riley. I know Major Shepard. I have known him since January, 1929. I knew Mrs. Shepard in her lifetime. I went to call on her in October, 1928. That was while the major was absent from Fort Riley. While the major was absent I did not see her very many times. I went in to telephone a couple of times and I took her out in my car once. I knew her well enough. The first time I went to use the telephone the orderly let me in. She was in bed the first morning. When I went to call on her the first time I had a conversation with Mrs. Shepard. I said the natural thing, I said, "When are you expecting Major Shepard?" "Oh," she said, "too soon;" she said, "I dread the time I have to sit

and look at him." I said, "That is too bad", and changed the subject. I said "I hear you are from California;" I said, "I love California; I have gone to school there, and we have been stationed there, and I would love to go back." She said, "I expect to go back soon, but I am going in a box." I said, "In a box?" She said, "Yes, I do not expect to live long; it is only a matter of months; I will not be here." I said, "Mrs. Shepard, you should not talk like that." She said, "I mean that; I will be gone by next Summer;" she said, "I have no desire to live, I do not want to live, I am anxious to know what is on the other side;" she said, "I am going to look at you on the other side of the veil." I started preaching to her and telling her life was short enough, and like that, and it did not do any good to be like that. The first time I called on her was sometime in October. About two weeks later I called her up and asked her if she would go to Junction City with me. She said yes, and I stopped back of her house on the way and picked her up. She asked me if I liked to go to the movies; I said that I did. She asked me if I would go with her two or three times a week, after Major Shepard returned. She said, "I will go crazy if I have to sit and look at him every night." I said, "Poor Major Shepard, is he so terrible?" She said, "I do not love him, and I
480 cannot stand to be around him." She had a lovely complexion, I always admired it. I had seen her passing in the cars, you know, and all that before I met her, and the time I called on her I started to tell her, of course, and my friends started to tell her, because it was so lovely and clear and white, and I of course remarked about it. I said, "You have the most exquisite skin I have ever seen;" I said, "how do you do it? What do you use?" She told me the cream she used, and all that. We talked about the cosmetics for a while. Then she said, "You know," she said, "did you ever notice how white a dope fiend's skin is?" I said, "Why, no." She said, "They are supposed to be white;" she said, "arsenic and morphin and those things do not hurt you if you know how to use them," and she looked kind of funny, and I looked at her and I said, "You do not use them?" She said, "Yes, I do." I said, "Where do you get them?" She said, "Out of the doctor's kit." I told her, I said, "That will ruin you, Mrs. Shepard, you should not use those things." She said, "I do not care;" she said, "by the end of this sum-

mer I will be dead and gone, I do not care." I met the major after he returned from Texas; in January I think it was. It was near springtime, and I was out looking around for my little girl, and I was coming up the back road and I saw Major Shepard and Mrs. Shepard out on the back stoop looking down on the new car parked there, and I said, "What a lovely new car." She said, "Do you like it?" I said, "I do, I think it is a beauty." She said, "I do not know whether it is or not, I cannot make up my mind." We talked about it and I went on home. She always looked nice. I thought she was a very goodlooking woman, except she did not have very pretty teeth, and she kept her mouth shut most of the time, she was conscious of them. Her face was like a sphinx, she had no expression.

Cross Examination.

Mr. Brewster: Q. She kept her mouth shut while
481 you were there?

Mr. Class: That is not fair.

The Court: Have you any objection to make?

Mr. Class: I make the objection it is not fair, and not proper examination.

The Court: Overruled. Proceed.

Mr. Brewster: Q. Answer the question: She kept it shut except when you were there? Were you her confidante?

A. I only saw her the few times mentioned.

Q. Just a few times. You were not, then, an intimate acquaintance of Mrs. Shepard at all, were you?

A. I knew her.

Q. What?

A. I knew her as well as I wanted to.

Q. As well as you wanted to. Why?

A. Because she gave me the heebie-jeebies, I did not like her. I was not prejudiced against her, I did not enjoy her. She did not know I did not like her.

Q. What was the first thing you said to her the first day you met her?

A. When I sat down I asked her when she expected Major Shepard.

Q. You were just a stranger then, she had never seen you before?

A. Yes.

Q. You went in and said "My name is Mrs. Winchester"?

A. Yes.
Q. You said, "When do you expect Major Shepard back"?
A. Yes.
Q. What did she say?
A. "Too soon, I dread the time he comes back".
Q. You swear to that?
A. Yes, sir.
Mr. Brewster: That is all.
Witness: I swear to everything I say.
Mr. Brewster: That is all.
Witness: I have told you the absolute truth.
Mr. Brewster: That is all.

Helen Holycross was called as a witness on behalf
482 of the defendant and testified as follows:

I am the wife of Captain Holycross. We have been stationed at Fort Riley about two and one-half years. I know Major Shepard. I first met Major Shepard when he came out to Fort Riley in the forepart of August, 1928, before he went to San Antonio. I knew his wife, Zenana. I met her at the same time I met Major Shepard. I first met them at Arnold Hall where we were staying waiting for quarters. It is sort of a hotel on the post where officers and their families stay, and eat, until they can get quarters of their own. I remember when Major Shepard was absent from Fort Riley and when he returned in December, 1928. I saw her at each mealtime until the forepart of September when we moved into quarters. After we moved into quarters I saw them very often. They just lived the second building from us. After Major Shepard returned we visited back and forth with the Shepards. I should say on an average of two or three times a week. I would not say she was ever a well woman after the time I met her. She was complaining quite frequently of a severe pain in her side, while he was gone. She said she thought she had appendicitis. I told her she should go to the hospital and have an examination but she said she would not go. She was not anxious to have him return. She said, if this trouble kept up, she probably would have to go, when he came home, that he would probably see that she did go and have an examination. I smelled the odor of liquor on Mrs. Shepard more than once during the time

I knew her. Frequently in the mornings when I would go down to her quarters and at different times, the afternoon parties. I could not say that her appearance was any different than any other time, just red. She was always depressed. She never looked me straight in the eye. The morning after she was taken sick about May 21, 1929, I was in her room and Major Shepard came in, and he told her to take *care* of herself, and hurry up and get well, and he would send her to California for a complete rest, and she
483 said, yes, she would in a box. I told her she should not think of such things, that she should make up her mind she was going to get well. During her last illness I called upon her very often, 3 or 4 times a week. I was not always able to gain admittance. I was refused by the nurse. I met her brother after he came, Ted McCoskey. I saw medicine in the sick room by the bed. I noticed a box of capsules on the table and bottles of different things. I saw Major Shepard more than once. He was not always there. I stayed 3 or 4 afternoons during her last illness while the nurse rested. I remember the time she went to the hospital. I saw her the day before. I had conversations with her on some of these occasions when Major Shepard was not there. She always said she was not getting any better, and she knew she would not be any better, and she said she got tired of so many doctors being around her; that she wished they would leave her alone, and let her rest. I observed the conduct and demeanor of the major toward his wife. It was always very gentlemanly; he was always very considerate of her at all times. He quite frequently sent her flowers and plants. She always said he did. I saw her Easter lily in the florist shop but could not say that he sent it.

Cross Examination.

I saw her Easter lily at the florist shop at the time I was buying one for my sick husband, but I cannot say that he sent it. Shepard was not in there buying an Easter lily for his wife, I said I had seen one in there for her. I do not know where it came from. Several times at parties I smelled liquor on her breath:

Q. Give me the names of those who were present at those parties?

A. They were mostly at our Medical Bridge parties.

Q. Who were they? Give me the names.

A. I cannot remember, just different ones, at different times.

Q. Who were they?

A. I cannot remember names.

Q. You cannot remember the name of a party, can you?

A. Not when they were there; it was quite frequently, different ones at different times.

Q. You do not remember a single person that was at any of those parties, so we could get them here?

(No answer.)

J. C. Dye was recalled as a witness on behalf of the
484 defendant, for recross examination by the government.

Recross examination by Mr. Brewster.

When I was on the stand I testified that I recommended that some calomel be given. I do not know whether it was given or not. I do not think it was. I suggested during her illness she be given a dose of calomel and this suggestion was not favorably received by Major Shepard and Major Hawley, and so far as I know, no calomel was given.

Redirect Examination.

I gave that statement to Major Hawley and Major
485 Shepard in the nose-and-throat clinic. I made a statement to the government agents. I do not have a copy. The statement was made in January to Mr. Glass.

Robert L. Crawford (colored) was called as a witness on behalf of the defendant and testified as follows:

My name is Private Robert L. Crawford. I live at Fort Riley. I am in the army as a private, and am attached to the Ninth Cavalry. I live at the Ninth Cavalry quarters. I am an orderly commonly known as a striker. My duties are to take charge of the officers' quarters and equipment and cleaning of the house. A number of houses, three or four. In September, 1928, I worked for Captain McDonald, Captain Carlson, Captain Winchester and Major Shepard. I was staying at Captain Winchester's and Major Shepard's. I knew Mrs. Shepard. I first met her on September 5, 1928. I became acquainted with Major Shepard in August, 1928. I

cannot recall the exact date. I started working for the Shepards Sept. 5, 1928. Labor duty. I moved into the Shepard apartment in August, the latter part of August, in the basement. I saw Mrs. Shepard while she occupied those quarters each and every day. I took all my meals at Major Shepard's quarters. I saw Mrs. Shepard every day. I saw her drink every day, practically. From September 5, 1928. I worked there from September 5 to the last of July, 1929. I purchased liquor for Mrs. Shepard at her direction. The first time I purchased liquor for her was on the first day after she came. At that time I got a quart. I got her another liquor. A quart about the second day. I got her other liquor about the third day. I never did get any other liquor for her. I do not recollect the party from whom I purchased it. He was a bootlegger. I recall after this, she bought liquor. I do not know the exact date but it was about a month afterwards; she bought a gallon. A month after I started to work for her. That lasted her about five days to my knowledge. Between September 15 and the day she took sick about every day, sometimes more than once a day. I do not recall a single day while I worked there that she did not take a drink of liquor. I do not know the kind, what brand always but it was corn. Corn whiskey. Corn
486 and wine. She drank beer. She made beer. She made this beer during the time Major Shepard was absent. She made beer for a month after he arrived. She made beer about every week in a five gallon crock and bottled it. I do not recall a single day while I was there that she did not take a drink. She would take three-quarters of a glassful mostly. A glass about the size of that glass right there. A water glass. (This was a half pint glass.) Most every morning after Major Shepard went to the hospital she took 3/4 glass of liquor. I saw her take a drink in the afternoon once. That was long before she was taken sick. Sometimes I would be upstairs all morning, and other times I would be there two and three hours. I had a schedule I worked on. Tuesday, all morning I filled in Mrs. Shepard's quarters. I do not recall any other days that I was there all morning. I took all of my meals there. I talked with Mrs. Shepard. I had a conversation with her about a month before she took ill. The occasion of that conversation was a couple of soldiers there got killed in a car accident and a lady called around to get some money to contribute flowers for

their burial; she gave me some money, I do not know how much it was. She stated afterwards, she gave that money because her body would be the next to leave Fort Riley and someone would be giving her flowers. Maybe a couple of weeks after that there came a storm one night and the next morning when I entered the dining room I spoke and asked her how she was feeling, and she said she was sleepy, tired. I asked her what was wrong and she said she had not slept any that night, she said the lightning excited her. I asked her why she was excited over lightning; she said she was going to die pretty soon. She said she was afraid of lightning, all right, but she had her way picked to go, and it was not by lightning. The day the major was supposed to arrive back from Texas she told me to clean up everything downstairs where she made beer and everything there, and be careful I did not mention anything about having beer around there, and drinking; if I did, I would get the worst end of it. She also told me the major was awfully easy to get along with if one did not make him angry. She said she
487 did not like him very much and some day intended to get a divorce and marry some younger man. That was on the occasion when she said she did not like him very much. I had a conversation once or twice with her while she was ill. It was the time I cleaned up the room. I cleaned it up three or four times while she was ill. One morning when I entered the room I asked her how she was feeling and she told me she was not racing with death. One of the conversations that someone told me she would not eat; that if she would eat she would get better. I asked her why she did not eat; she told me if she ate she would get better and she did not want to. I saw her the day she took ill. I saw her first that morning she drank a bottle of beer. That was before breakfast. Then later on she drank another bottle of beer and before I left to go to my next family's house she drank a glass of whiskey. I left to go to the next family's house at eight o'clock. She drank a glass of beer twice and a glass of whiskey before 8 o'clock. The glass was about three-quarters full I guess. It was the same kind of glass. When I was cleaning up the room in which she was lying ill I noticed the table was on the lefthand side of the bed, and there was on top of the table I do not remember everything. It was within hand reach of the bed. One was a box, a little

round box, another was a bottle with some kind of liquid medicine. I noticed this bottle, it had some kind of greenish or bluish-colored medicine in it. It was a pint bottle. It was white at the top and bluish at the bottom. I did not see anything else on the table except flowers. I helped move bottles and stuff out of the basement after the Shepards left. After Mrs. Shepard's death. I do not remember the date. It was about a week after she died. I talked with a government agent about this case. It was the one sitting in the clair facing me right there (Mr. Glass).

Cross Examination.

From September 5, 1928, until the day she took ill she drank a three-quarter glass of whiskey every day. I saw her do that. Every day. To my remembrance I would say she did. Some days she drank more than that. On September 5, 6 and 7 of 1928, I bought a quart of whiskey for her each day. I do not know who I bought it of. She told me to get it. She did not tell me to go and get it at a cer-
488 tain place. I knew. I went on the post. I do not know as I can name the place and house I went to but I went into a house over there and got the whiskey. I have been on that post nine years.

Q. How long have you been out there on that post?
A. Nine years.
Q. You tell this court and jury you do not know where the place was on that post, where you went and got that whiskey?
A. Surely I do.
Q. Of whom was it that you got it?
A. He was a soldier, I do not know his name.
Q. How long had he been in the army?
A. I do not know.
Q. In the same company with you?
A. No, no.
Q. In what company was he?
A. He was in the Second Cavalry.
Q. What is his name?
A. I do not know.
Q. How did you know to go to him?
A. Because I had been to him before.
Q. How did you get to him before?
A. Someone carried me.
Q. Who carried you there?

A. I do not know who he was.

Q. How did you know who to go to to get to carry you to this bootlegger?

A. I was asking a question of other people.

Q. Who were these other people?

A. I do not know them.

Q. But, anyway, you purchased liquor?

A. I did.

Q. Intoxicating liquor, on September 5, 6, and 7, of 1928? You will swear to that?

A. I would.

Q. All right. You took that for Mrs. Shepard?

A. I did.

Q. Now, then, you say that she was a confidant of yours?

A. I did.

Q. She talked over different things with you; she talked over death with you, she talked over all of her intimate social life with you? You are asking the court and jury to take that statement; is that correct?

A. I did.

Q. I believe you stated that you were in her room on the day she took ill?

A. I was.

Q. What date was that?

A. I can not recall.

Q. How do you know you were in there?

A. Because I worked there every day.

Q. Now, then, I believe you state that, after she took ill, you had conversations with her; is that correct?

A. After she took ill, I did.

Q. Were those conversations in the morning, or in the afternoon?

A. Some of them in the morning, some in the evening.

Q. How many were in the morning?

A. I do not know.

Q. Who was there besides yourself, in the morning, when you had these conversations?

A. Miss Brown was one of them.

Q. Miss Brown was there. All right, tell the jury the conversation you had with Mrs. Shepard when Miss Brown was present.

A. Miss Brown was not present.

Q. You just got through saying she was?

A. She was in the house.
Q. In what part of the house was she?
A. I do not know.

Q. Anyway, Mrs. Shepard waited until Miss Brown
489 went out before she began to confide in you; is that correct?

A. I am quite sure, because once, she asked me to call Miss Brown back in.
Q. I am not asking you that; I am just asking you—you say, once she had you call Miss Brown back in the room?
A. She did.
Q. What happened at that time?
A. I do not know, I left.

Elizabeth S. Strickler was called as a witness on
490 behalf of the defendant and testified as follows:

My name is Elizabeth S. Strickler. I am the wife of Major Strickler and now stationed at Fort Riley. My husband went on duty there in October, 1928. We became acquainted with Mrs. Shepard shortly after we went there and met Major Shepard as soon as he came home from Kelly Field or wherever he was in December, 1928. I saw quite a great deal of Mrs. Shepard during the first part of my stay there because I was not driving my car and she used to take me down town a great deal, three or four times a week. I also knew Mrs. Grissinger, the wife of Colonel Grissinger. I often saw Mrs. Shepard at social affairs. We had a medical club that met every two weeks, and I always saw her there, sometimes oftener. On those occasions I did not see Mrs. Shepard take a drink of liquor. I saw her on other occasions when I observed or detected the odor of liquor on her breath. I have seen her drink several times. That would be in the mornings. I have seen Mrs. Shepard under the influence of liquor. I saw her drinking several times. I could not say how many times a week. When she was intoxicated she was very cheerful. I saw Mrs. Shepard the day she took sick down town in Junction City about 10:30 in the morning in front of the First National Bank. Ordinarily she was very pale, and this day her face was very much bloated and red, and it struck me very forcibly. My opinion is that she was intoxicated. That is my belief. Mrs. Gris-

singer, the wife of Colonel Grissinger, was with me. I called upon her about a week after she was stricken, about 11 o'clock in the morning. When I went in there, there were other women in there, and she seemed in a very happy frame of mind. She said she was getting better. She said, "Oh yes, I am very much better. It is a lovely day, and we will be having bridge parties soon, and are not my flowers lovely?" I would say her talk was incoherent. I observed her teeth and gums every time I saw her. She showed her teeth and her gums were blue and her mouth just looked badly.
491 She mentioned having her teeth extracted. At the time I saw her on May the 20th, 1929, I noticed that she had always been very pale. I do not think she ever used any makeup at all, and this day her face was very much bloated and red, which struck me as being very peculiar. She barely nodded. She didn't give me a chance to nod. I remember a particular occasion when Mrs. Shepard was present at an afternoon tea at her home in 1929 when I should say she was intoxicated. We were playing bridge, and ordinarily she was a very good bridge player and her acts at that time led me to believe she was not responsible. She seemed hazy in her mind, and she did not seem clear at all. Her talk was kind of foolish. I don't remember what she said but from her demeanor and conduct I would say that she was intoxicated. I detected the odor of liquor on her breath. I also detected the odor on her breath at other times when I have seen her intoxicated.

Cross Examination.

I saw her about a week after she was sick. She was incoherent.

Q. What was it she said? You gave the conversation; she said she felt better?

A. I gave her conversation.

Q. I am asking for it now, again—

A. As I remember it, when I went in, I asked her how she felt, and she said she felt very much better.

Q. That was incoherent?

A. No.

Q. All right. Now, what was the rest of that?

A. We would be having bridge parties very soon.

Q. Was that incoherent?

A. I considered her whole conversation.

. . . . . .

Q. Now, you say she said she was feeling better, that they would soon be playing bridge?: Now, what else did she say?

A. Then she suddenly said, "Are not my flowers
492 lovely?

Q. Were they lovely?

A. Yes.

Q. Was that incoherent?

A. No, not in itself.

. . . . . .

Q. Then she said three things, that she was feeling better, that there would soon be bridge parties, and her flowers were beautiful?

A. Yes.

Q. And you have detailed all the conversation you remember except that it was a beautiful day?

A. Yes, a beautiful day.

Q. Are you sick now, yourself?

A. Yes.

Q. What is the trouble?

A. I have polyneuritis, and I have milk leg and a cardiac condition.

Mrs. Dye and the nurse were there and there was another woman there I did not know. I did not say that I saw her drink at parties.

Q. At the Bridge Club?

A. No, my goodness, no.

I never saw her drink at Bridge Clubs. I never saw her intoxicated at Bridge Club; that would be the one place she would not be intoxicated. We play Bridge at Bridge Club. I said it was an affair she had at her home. She was playing Bridge. Mrs. Carleton DeWitt was there. Mrs. DeWitt is now in France. Mrs. Grissinger was there. Mrs. Grissinger is in the Philippines. I do not remember a single time when I saw her intoxicated in the presence of anybody who is now in the United States except myself. I do not think that is peculiar because Mrs. Shepard was more or less of a solitary drinker. As I say the Clubs that would be the last place in the world she would drink. She was drinking in the house. She was drinking down town. I said that she is a solitary drinker because I have been to her house in the morning and I have seen Mrs. Shepard fix up drinks and drink. That is

what I call a solitary drinker; when anyone drinks as early as ten o'clock in the morning. I would say he was a
493 solitary drinker. She drank in front of me; I have been in the kitchen when she was shaking up drinks. I saw her in a home intoxicated; I can remember three times specifically.

Q. Was anybody there but you?

A. Yes, one time there was the mother, an old lady, the mother of an Army Officer came in.

I do not know her name. I do not even know whether she is in the United States. I believe it was Capt. Carson's mother. I do not know where Capt. Carson is.

Q. Can you give me somebody that I can look up that is not in France or the Philippines?

A. No, I cannot.

It was probably between 10 and 10:30 when I met her on the Saturday the morning she took sick. We parked diagonally and Mrs. Grissinger parked right next to her, that put me right on the side, on Mrs. Shepard's side. Mrs. Shepard came out and got in her car as Mrs. Grissinger and I went in. She came out of the beauty parlor in the bank. The Beauty Parlor was ran by two sisters; one of their names was Turner. The other was Wally, I believe. She had gone to the Beauty Parlor and came out with a red and swollen face. When I saw her intoxicated at her home, her face was not always red and swollen. A red and swollen face was not necessarily a sign of intoxication with her. The other thing I have to base my claim that she was intoxicated is, that ordinarily, Mrs. Shepard and I were very good friends, but she did not stop and talk with me, she tried to get out as quickly as possible and said a very curt Good Morning. I never had claimed she was a drunkard. I never did before. I had mentioned it to my husband.

Q. The fact that she did not speak to you made you think that she was drunk?

A. No, it was not only that, but the fact her face was red and swollen, and she did not seem to know what she was doing.

Q. What did she do that made you think that?

A. She had difficulty in getting her car out.

Q. Lots of people have that difficulty, do they not?

A. I guess so.

Q. Describe that trouble?

494 A. In getting her car out she had trouble. As I say, we parked diagonally and she had trouble in backing out.

I have seen her when she was sober more often sober than drunk. I do not remember the date when I saw her taking a drink. She played Bridge rightly. I do not remember that she trumped her partners Ace. I do not necessarily think that a person who does not play Bridge rightly is not sober. I told Mr. Class that I thought she was drunk because she did not play Bridge rightly. She did not play her usual game of Bridge. She seemed incoherent, that day, too.

Q. Incoherent; what do you mean by incoherent in playing Bridge?

A. Well, instead of playing her usually good game of Bridge, she did not play well and she acted silly, which was unusual for Mrs. Shepard.

Q. How did she act silly?

A. In her remarks.

Q. Can you recollect a single remark?

A. I cannot.

I recollect they were silly just the same as you would recollect if they were silly. I cannot remember a single silly remark she made. I do not remember remarks like that. I was not very intimate with her. She drove me to town about three times a week. She drove me back too. That was in the morning.

Q. Were you not afraid to ride with a woman who got drunk so frequently?

A. I could not say she was drunk frequently.

Redirect Examination.

Elizabeth S. Strickler testified as follows: Major Strickler and I were married May 10, 1911. He was practicing medicine at that time. He entered the service of the United States Army in 1917 during the World War and has been continuously in it ever since. I have been with my husband except when he was in France. We have been stationed at Army Posts. Frequently some of the army officers are shifted from post to post and some of them are not. Mrs. Shepard was not the only person I have ever seen intoxicated. I think I am quite capable of telling whether a person is in-

495 toxicated or sober.

Recross Examination.

Elizabeth S. Strickler testified as follows: I have seen women drunk. I could not tell you ofthand how many. I remember specifically seeing a woman drunk on the street in Washington.

She came up to me and put her arms around me and
496 offered me a drink. She was a perfect stranger. Mrs.
Shepard never came up and put her arms around me and offered me a drink. I am 42 years of age.

Mrs. Veda Snyder was called as a witness on behalf of the defendant and testified as follows:

My name is Veda Snyder. I live at Junction City and conduct a beauty shop. I was acquainted with Mrs. Charles A. Shepard in her lifetime. I first became acquainted with her as near as I can remember September 1, 1928. I had occasion to give her treatments during the fall and early winter of 1928. I gave her treatments while her husband was in San Antonio, Texas. Shortly before his return I had a conversation with her in my shop. She was telling me that Major Shepard was coming back and I said to her, "I suppose you are very happy?" She said I cannot say that I am. She then said "I do not love my husband." I didn't say anything. I gave her treatments for her shoulders and her neck for nervousness. She called at my place on the 16th or 17th of May, 1929, after the dinner hour in the evening, that is, after my business hours. She talked very little but she looked very ill. I gave her a treatment. While I was giving her the treatment she told me it would be her last time in my shop and of course it was a shock to me, and I tried to put it off in a different way and I said, "Why, are you going to some other shop Mrs. Shepard?" and she said "No, that is not what I mean at all." She just closed her eyes and didn't say anything. A few days after that I heard of her illness. I was called to her home. I imagine it was three or four or five days, I could not say. I shampooed and curled her hair once, perhaps twice, and then I curled it two or three times. After she was taken ill I had a conversation with her about her hair. She asked to be dressed at Sawtell's funeral home. I said, "You must not talk that way, you will be down to my shop again, and you know it." After her death I did dress her hair at the funeral home.

Cross Examination.

On cross examination Veda Snyder testified as follows:

497 She appeared to be sick when she told me she would not come again. She was sick in bed when she told me she was not going to get well, that was her last illness. She did not tell me what was the matter. I was interviewed by Mr. Glass of the Department of Justice. I do not think I told him this, I do not remember.

Q. He asked you if you knew anything about this case?

A. He asked me a few questions, yes, sir.

Q. Why did you not tell him about it?

A. I do not think he asked me that special question.

I cannot recall all the questions he asked me. He asked me I think if I knew whether she was a drinking woman or a dope fiend, I told him not to my knowledge. I had seen her quite frequently. The last time she was in I thought she was ill.

Redirect Examination.

On redirect examination Veda Snyder testified as follows: Mr. Glass the Government detective who talked with me never asked me anything tbout the conversation at her home or about the conversation that occurred at my place of business that I can remember.

Recross Examination.

On recross examination Veda Snyder testified as follows: She quit my shop and came back. She came several times for treatment. She came on the 17th of May and never came back to the shop.

Redirect Examination.

On redirect examination Veda Snyder testified as follows: She came to my shop for treatment of her neck and shoulders. Mrs. Turner did not do that work to my knowledge.

Lillian Turner called as a witness on behalf of the defendant, and testified as follows:

My name is Lillian Turner. I live at Junction City. I was living there in 1929, and I operated a beauty shop on the

second floor of the First National Bank. I knew Mrs. Zenana Shepard. She patronized my shop during that year. She was in it during the month of May on the 3rd and on the 10th and on the day that she took sick. When she was in my shop on the 20th day of May, the day she took ill I detected the odor of liquor on her breath, I believe. She had her hair shampooed and waved. After the treatment had been given her she could hardly walk. She staggered.
498 After Mrs. Shepard's death one of the Government agents, Mr. Glass or Mr. Caffrey called to see me. I do not know how long. Mrs. Shepard was to see me on the 20th some time in the morning. It was before lunch time and the treatment was completed before noon I think.

Cross Examination.

On cross examination Lillian Turner testified as follows: I told the Government man I didnt know anything about it. I dont discuss personal affairs. I didnt know what the Government man was there for. I didnt know whether he was a Government investigator or not. He told me he was. I didnt tell him I didnt know anything about her drinking. I told him I didnt remember anything about it. I believe he talked to my sister.

Redirect Examination.

On redirect examination Lillian Turner testified as follows: I dont remember seeing the picture of the Government detective or that he showed me his photograph. My sister was associated with me in the operation of the business. Her name is Mamie Wallie. I dont think she was in the shop that day that this conversation took place.

C. J. Gentzkow was called as a witness on behalf of the defendant and testified as follows:

My name is Major C. J. Gentzkow, Medical Corps, United States Army. I am a physician. I graduated in medicine in 1915 from George Washington University College of Medicine. Prior to graduation I had three years of work in the laboratory of Garfield Memorial Hospital. After graduation, a year and a half in Columbia Hospital in Washington. I entered the regular American Army in 1917. I was in the

English Army first. Upon the entry of the United States in the World War I resigned that commission. I was not actually in the English Army. I had a tentative position. I was in the World War and was in Europe two years and ten months. I was with troops in the field until July of 1919.

499 At that time I took over the laboratory work at Brest and also the base section laboratory and in November, 1919, I went to Coblenz and took over the third army laboratory. I was in charge and remained there until March, 1921, when I returned to the United States and took over the laboratory service of the hospital at Camp Grant, then to Benjamin Harrison in the Fifth Corps laboratory; remained there until 1924, then to San Antonio for duty in 1928 when I was assigned to take a course of instruction in the Massachusetts Institute of Technology at Boston. That was post-graduate work. I graduated there in June, 1929, with the degree of Doctor of Philosophy and Biology and Public Health. Then I was sent to Fitzsimons General Hospital and am chief of the laboratory service there now.

For the purpose of toxicological administration poisons are divided roughly into four main groups: The first group, those that are volatile with steam, that is, those that can be distilled off the mixture; the second group is composed of organic composition, that are not volative with steam, and, in this group the alkaloids are found; the third group is the metallic poisons; in the fourth group are those that cannot be grouped together in the other three groups, including caustic acids and alkalis, and some organic compounds that cannot be placed in the other groups.

It is very much easier to detect the metallic poisons, particularly, as compared with organic and alkoloidal poisons, because they are compounds which resist destruction. The alkaloidals are organic compounds of very elaborate structure. They are usually present in very minute amount. The process of separation is difficult, and it is extremely difficult to get them into a pure state, so that they may be readily recognized. I should say the group of metallic poisons is by far the easiest to separate and identify.

Mercury falls in the group of metallic poisons, and is easily identified. I have had some experience in pathology. Am also a chemist. I have also had experience in performing autopsies. I have heard most of the testimony and the evidence in this case, having been present in the court room,

and have heard that part with reference to her taking sick on the night of May 20, 1929.

Q. You heard all those facts and circumstances related?

A. I have.

Q. At the time that Mrs. Shepard was taken sick, had you been called as the attending physician to attend her, would you have diagnosed her illness as due to mercury poisoning?

Mr. Brewster: We object to this as incompetent and immaterial and not a proper question.

The Court: Sustained.

Q. Why?

500 Mr. Brewster: The question of how he would diagnose it.

Q. Would you say, doctor, that her symptoms were indicative of mercury poisoning?

Mr. Brewster: Objected to as not stating a hypothetical question.

Mr. Kagey: If he heard the testimony, he has a right to testify.

The Court: Sustained.

Mr. Kagey: Note an exception to the ruling of the Court.

Q. Doctor, in case a woman 37 or 38 years of age, dies after about 25 days illness, and poison is suspected, and an autopsy is performed upon her body, have you a judgment as to how that autopsy ought to be made?

A. If poisoning were suspected, personally, I should say—

Mr. Brewster: Objected to as not responsive.

Mr. Kagey: I said, if poison were suspected.

The Court: You asked, if he has an opinion?

Mr. Kagey: Yes, sir.

The Court: Sustained.

I heard the testimony of Major Strickler and Major Hawley, the attending physician, and am sufficiently familiar with the facts with reference to her last illness and death as to have formed an opinion about this matter; that is, from the evidence of these attending physicians. In any case where poison is suspected I should do a most complete autopsy for the purpose of ruling out absolutely any chance for any pathology which might have a bearing on the case. In a complete autopsy I would remove all the viscera, including the brain and the stomach, all of the parts, including the heart and the lungs, and examine them grossly and microscopically.

In answer to the question as to my judgment as to whether mercury could have caused this death I would say that personally I would not want to have an opinion as to the cause of death in a case of that kind.

Cross Examination.

On cross examination C. J. Gentzkow testified as follows: Mercury eliminates considerably, but the elimination is not always constant. As a general rule there would be some elimination. Over a period of 25 days I do not think one can state an exact proportion as to how much would be eliminated. There is usually some elimination, but there is such a great deal of variance in the amount, under different circumstances that I cannot answer that. I cannot give you an idea because the variation is so great. If a person took mercury or was given mercury on May 20, and approximately three grains were recovered on July 15 I would not
501 say how much mercury she had taken or been given because there might have been a very small elimination or a tremendous amount. I would suspect it, I would not have a definite opinion as to mercury being the cause of death. If you get three grains out of a woman after death and there were no other pathology present, yes, sir, if there were no blood clot in the brain or embolism in the lungs I surely would suspect mercury. Mercury strikes the stomach and then the big intestine more than it does the little intestine. Some of the other metallic poisons act similarly. I know of no poison except mercury that strikes the stomach and then the big instestine more than the little intestine. I didn't hear the testimony of Colonel Callender.

Edward J. Strickler, being recalled for defendant testified as follows:

I had three years in the practice of medicine before going into the Army and approximately six years experience in psychiatry. I am now chief of the Medical Service at Fort Riley. When I was called to see Mrs. Shepard there was nothing about her symptoms or the history of her case or her appearance that in my judgment made it proper to use a stomach pump. I considered her condition was due to the long continued use of alcohol and she had finally reached the

breaking point, and it was due to that alcohol that had gone before, not that she might have taken that day or a day or two preceding. If she had had ulcers in her stomach the use of a stomach pump would have been very prejudicial had one been used. I did not think of using a stomach pump at all. I knew there was an epidemic of measles throughout and surrounding the Fort prior to Mrs. Shepard's illness and that Major Shepard was threating those patients.

Recross Examination.

On recross examination Edward J. Strickler testified as follows: The presence of ulcers in the stomach would make the use of a stomach pump very prejudicial. I had no idea of using a stomach pump. As I said, there was nothing to indicate the use of a stomach pump. Bichloride of mercury is a corrosive poison and a stomach pump is contra-indicated in that case. One should not try to get the mercury out with a stomach pump. That would be dangerous. It should be by the administration of an emetic. I would give an emetic. That too, would be dangerous, but not so dangerous as a stomach pump. I would choose the lesser of the
502 two dangers and give an emetic. Any corrosive poisons harm the membrane lining of the stomach and might cause a hemorrhage. There might be danger if you got your stomach pump in in five minutes. If the patient had taken bad liquor it would depend on the amount that was taken and when the liquor was taken, if a few minutes before it would be all right. I said I didnt believe the condition which I found was the cause of death. I never knew what caused the death. I quit the case.

J. W. Faust, was called as a witness on behalf of the defendant, and testified as follows:

I am a physician and surgeon, a graduate of the Cornell University Medical College of 1903, and have practiced my profession since graduation. I had a post-graduate course in Germany and one in the Army. I am practicing in Kansas City, Kansas, and have practiced ever since 1904, general practice. I treat sixty per cent of my patients in their homes and the other forty per cent in the hospitals.

Q. Doctor, if you were called to a woman's home, the

woman was 37 years of age, and you obtained the history of the excessive use of alcohol over periods of years, and who had been drinking heavily on the day on which she was taken suddenly ill, and was found in a dazed condition, and who said, when found and asked what the matter was, that she had drunk some bad liquor, that she was placed upon her bed practically delirious; and, when you saw the patient, anywhere from 15 to 45 minutes after the onset of the illness, and she showed the following symptoms: delirium, picking imaginary objects out of the air, picking at the bedclothes, diarrhea, the pupils of the eyes—dilated pupils of the eyes in light, blindness to such a degree unable to count fingers held close before her eyes; a marked neuroretinitis, breath smelling of alcohol, knee jerks loose, complaint of numbness in the extremities, with the pain in the abdomen, but vomiting several hours later, and who, during the succeeding ten days, showed high improvement on the whole, also neurological mental condition; who had no tenderness or lesions in the abdomen, with bowels loose, or constipated, which may be due to the medicine taken, soda phosphate, and later bismuth; urine negative except one specimen showed a trace of albumen, vomiting and irregular fever from time to time; white blood count 69,000 to 19,600 polys on May 31; there was no suppression of urine; no reduction in the amount of urine, so far as is known, red blood count, 4,250,000, hemoglobin, 80, heart sounds reported as muffled and weak, no irregularities; lungs not examined, but no symptoms of pulmonary disease reported; and who, about June 1, had several intestinal hemorrhages within twenty-four hours, following which the red blood count dropped to 3,500,000, hemoglobin, 70 per cent; hemorrhages from the intestine ceased and did not recur, and, during the next few days, the red blood cells increased to 4,000,000; (the white blood cells varied from 19,400, 75 per cent polys, on June 1, to 23,600 with 72 per cent polys, on June 5, then gradually increasing up to 32,000 with 84 per cent polys, June 7, a few days
503 before this death, 54,000 with 84 per cent polys. There was never any edema present anywhere; the temperature varied from normal to 99 degrees—40; throughout her illness there was an infection of the mouth reported by the dental officers in attendance on the case, who described the oral condition as a painful mouth condition, bleeding gums covered with a greyish-white membrane, which could be pushed

away with an applicator, leaving a slightly bleeding surface, a fetid odor, no sponginess of the gums or teeth, or salivation very slight, which improved while being treated with a mercuric mouth wash;

The urine, feces, saliva, not being examined for mercury, the mouth condition not being examined for Vincent's organism;

The patient died on the twenty-sixth day of her illness, with extreme weakness and loss of consciousness just before death:

Would you consider this a typical case of mercury poisoning?

Mr. Brewster: We object to this as leading and suggestive. He may state what his opinion was as to the trouble.

Mr. Kagey: A hypothetical question, your honor, is always leading.

The Court: That is all your question?

Mr. Kagey: Yes, sir, that is all on this question.

Q. Would you consider that a case of mercuric poisoning?

The Court: I am of the opinion your question does contain suggestions that are not proper.

Mr. Kagey: What part, Judge? May be I can change it.

The Court: I would have to go through the whole question to tell you. You know they are not proper, and all of the elements are not there that have been brought out here showing mercuric poisoning. However, if this is the theory of your case, I will permit this witness to answer. I do not think it is a fair question, but, if it is your theory of the case, I will permit him to answer.

Mr. Kagey: That is what we claim. We are not bound by anything except what we ask for.

The Court: You have not stated it all.

Mr. Kagey: If they claim there are any other, they may cross examine.

The Court: But I will permit him to answer under your theory.

A. I have an opinion.

Mr. Kagey: Q. What is your opinion?

A. Based upon the hypothetical question, that that is not a typical case of mercuric poisoning.

I would say the fact that the patient died on the 26th day of her illness without having shown any time during her illness any suppression of urine or any urinary symptoms ex-

cept the trace of albumen reported on one examination was not typical of mercurial poisoning. If I performed an autopsy on this patient or had the autopsy performed by any one I would want the heart, the brain, the lungs, as well as the other organs examined in order to determine the clinical and pathological diagnosis in the case. I most certainly should like to look at all of the organs of the body before forming an opinion as to the cause of death. If I suspected mercurial or arsenical poisoning in a case I would say it would be proper to perform a complete autopsy with the sections of
the different organs taken out of the body and a chem-
504 ical examination for metallic poisoning. I should want
the whole of the liver, the pancreas, the spleen, the stomach, the intestines, both kidneys, the brain, the heart, the adrenals, and the lungs, and some portions of muscles.

Q. Yes, sir. Supposing that, instead of a complete post-mortem, only a piece of liver, one whole kidney, and part of another kidney, the pancreas, the spleen, the stomach, the large and small bowel were removed; assuming further that an ulcer sufficiently old that it was stated to have been possibly present before the onset of the last illness, and another one, possibly new, along with some inflammation, and the mucous membrane of the stomach was present, some inflammation present, but no ulcers, in the small intestines, but in the large intestine there were many small ulcers covered with a diphtheritic membrane; that the kidney only showed some cloudy swelling grossly, and there was insufficient microscopic evidence to indicate the so-called bichlorid kidney, and the spleen, liver and pancreas, which were normal grossly;

Would you care to make a definite diagnosis of mercuric poisoning?

A. I would not.

Q. Please explain why, Doctor?

A. Because mercuric poisoning has certain definite evidences in the kidney, the liver, the pancreas, the spleen, the large bowel, and, if those evidences were not present, one could not make a positive diagnosis of mercuric poisoning.

Q. Doctor, assuming that the chemical examination showed the presence of mercury in small quantities, and a chemical analysis showed a presence in the stomach, kidneys, liver, and so forth, and intestines, of between two and three grains of mercury, made after the death and after the autopsy in the manner stated, would you care to state before this jury

that the cause of death of that person was mercuric poisoning?

A. I should hesitate to state positively that the death was due to mercuric poisoning, although there was presumptive evidence present that mercury had something to do with the death of the patient.

Q. Yes. In order to determine the cause of death with absolute certainty, in such a case, would you not want to see the heart, lungs, and brain, even though mercury was found in the stomach, liver and kidneys, by one toxicologist, to be between two and three grains, by estimate?

A. I did not get the drift of your question.

Q. In order to determine the cause of death with absolute certainty, in such a case, would you want to see the heart, lungs and brain, even though mercury, estimated to be between two and three grains, was reported by one toxicologist to have been found in the organs named?

A. Yes, I should want to see those other organs.

Q. Doctor, do you know if bichlorid of mercury is absorbable when taken in the mouth as a mouth wash?

A. I do know that it is absorbable in those circumstances.

Mr. Brewster: We object—in what circumstances?

Mr. Kagey: Q. Tell the circumstances.

A. When taken into the mouth as a mouthwash.

Q. Doctor, when mercury is taken into the mouth as a mouth wash, is absorption throughout the lining membrance of the mouth possible? I think that is the same question I asked you, but it may be different?

A. It is possible.

Q. How can mercury be absorbed into the body when bichoride of mercury is used as a mouthwash? Will you explain that to the jury?

A. Mercury is a definite chemical compound, with
505 albumin; mercury albuminate, and that mercury albuminate is found when you take mercury into your mouth as a mouthwash, and that albuminate is absorbed into the blood stream, it gets in through the digestive organs, partly, and partly through the blood stream.

Q. Doctor, suppose a patient has been given a bichloride of mercury mouthwash for Vincent's infection of the mouth, for 14 or 15 or 16 days, and that this mouthwash is 1-to-4000 solution of bichloride of mercury, this solution containing about two grains to the pint, and running anywhere from

three to five pints during that time; this is administered every two hours while awake; could this treatment account for the finding of a lethal dose of mercury in the body, providing the evidence had been shown that the mercury had not been introduced otherwise?

A. In my opinion, it could be absorbed in sufficient quantities, as a mouthwash, to become a lethal dose.

Q. If a patient, doctor, receives sufficient mercury in a brief period of time to cause death, would you not expect to find suppression of the urine and marked urinal findings, would you not expect to find severe disease to the kidneys?

A. I would.

Q. In a case, where all the typical symptoms, which you have heard briefly described, and in which a rather severe Vincent's infection of the mouth existed, and Vincent's organisms were found in the ulcers of the stomach and intestines, and the lungs, heart and brain were not removed and examined in the postmortem, do you think Vincent's infection could have played a prominent, or at least some, part in the death of the patient?

A. In my opinion, Vincent's Angina could contribute to the death of the patient, such as you described in your previous question.

Q. The fact, Doctor, that a patient's illness began with blindness, severe neuroretinitis, numbness of the extremities, picking imaginary objects out of the air, breath reeking with alcohol, and patient vomiting, would it, in your judgment, be reasonable to consider that such symptoms were due to alcohol, in the absence of any other definite symptoms appearing?

A. It would be reasonable to suspect the alcohol as causing those symptoms.

Cross Examination.

On cross examination J. W. Faust testified as follows:

I am ordinarily familiar with bichloride poisoning. I have treated five cases within the last five years. I have been called soon after the bichloride was administered. The first thing I did was to neutralize the bichloride with albumen, white of eggs, and wash out the stomach if they had not vomited.

Q. How did you wash out the stomach?

A. With a stomach pump.

Q. Do you mean to tell the jury that is a proper treatment, to use a stomach pump?

A. If the patient has not vomited.

Q. That is recognized?

A. Yes, sir.

Q. Do you not know it is not?

A. I do know it is.

Q. You are sure of that?

A. Yes, sir.

506 I think there is no mistake about trying to get rid of the poison after it is in the stomach. If I suspected poisonous liquor I would usually try to get rid of the poisonous liquor by making them vomit. After all my years of experience, if I suspected poisonous liquor, I would try to get rid of it. If the patient had only drunk alcohol I would try to make them vomit. If they did not I would give a dose of apomorphin to make them vomit. Then I would try to wash the stomach with a pump.

Q. Would you do that with alcohol?

A. Yes, sir.

Q. After you got there, if the symptoms were such that they caused you to ask the husband if it were not possible bichloride had been taken into the stomach with the liquor, would you then think of a stomach pump?

A. Yes, sir.

Q. Do you not know that would tear them all to pieces?

A. I do not know it.

Q. Will you tell this jury that a stomach pump would not just rip them open?

A. I will tell this jury that is proper treatment, to wash poisons away from a stomach that contains poison.

Q. That is what I thought.

The amount of mercury present would eliminate between May 20, and June 15, varies under different conditions. One could not even approximate it, unless one made determinations of the urine and saliva and bowel evacuation. Some would have a mercuric sore mouth and some would not. The soreness starts at the gum margins usually. Vincents Angina starts usually in the same place, around the cavities in the teeth and sometimes on the tongue. I would say that a typical case of bichloride mouth was easily distinguishable from the Vincents Angina. I think Vincents Angina could

be determined by microscopic examination and differentiated from typical mercuric stomatitis. Microscopic examination is the only way one could tell, I am sure of that, I am positive. That would be done as swabs from the mouth.

Q. If you take swabs from the mouth, would there
507 be any way to tell the difference between bichloride mouth and the Vincent's mouth?

A. No, sir.

I do not know of any case where death resulted from using a bichloride mouth wash; I know of a death that resulted from vaginal douch here in this town.

Q. Would you not think the administration of bichloride of mercury in such quantities it might be absorbed in lethal quantities, that it would almost be criminal practice?

A. Please state your question again?

Q. Would you not think it almost criminal practice to give mercury in the mouth in such quantities that enough could be absorbed to kill a person?

A. Of course that would have to be determined by substances in which it was administered, the intent, and all that. One cannot imply criminality to an act that is done with good intent.

It would be mighty poor practice to give a mouth wash with enough mercury in it, that it could be absorbed and kill a person. I do know the effect of peroxide of hydrogen on bichloride of mercury. Peroxide of hydrogen kills pus germs. I never heard of a prescription consisting of bichloride of mercury in the proportion of 1 to 2000 with enough peroxide added to make it 1 to 4000 as stated by the witnesses for the defense. A person would have to take all of that stuff in order to get all the mercury that was in it. I am sure of that. I mean to tell the jury that if you put two grains of bichloride of mercury in a pint of water it would be a physical impossibility for you to get the two grains dissolved without taking the whole pint. I do not think you could get a lethal dose from just half the solution and you could not get it from the pint, unless you took every drop of it into the stomach. Three grains of mercury will kill if you get it all at one time. If you find three grains of mercury in a person after death, that would not necessarily indicate that they had a lethal dose of mercury, because larger doses have been given and did not kill. Three grains will kill occasionally. Three grains found 25 days after the ad-

ministration of it, would be presumptive evidence that more mercury had been administered. I know Major Ash through reading literature of Major Ash. I know Major Ash
508 is considered an authority on pathology.

Q. Now Doctor, let me ask you: If this woman died after she had been sick for twenty-five days, and her husband objected to any autopsy at all, and finally the autopsy was ordered, with the understanding between the parties making it, that they would only go to the extent of finding the cause of death, and they proceeded to take out the viscera, and, when it was taken out, it showed the stomach had two ulcers, one partly healed and one not healed, what would that indicate, if bichloride had been administered, as to the administration of it?

A. It might or might not indicate anything.

Q. If caused by the bichloride, what would it indi-
509 cate as to how it had been administered?

A. If one could say positively that ulcer in the stomach was caused by bichloride, then one would have presumptive evidence of bichloride poisoning.

Q. If there was another ulcer, at the same time, caused by bichloride, what would that indicate?

Mr. Kagey: We object to that as assuming a fact not in issue; this witness has not testified there was any other ulcer caused by bichloride of mercury. He testified they were there; he did not testifiy they were caused by bichloride of mercury.

The Court: He may answer.

(Last question read as above recorded.)

Mr. Brewster: Q. And separated by a considerable space from the first one?

A. If it was caused by bichloride, that would be presumptive evidence of bichloride poisoning.

Q. Would it indicate, perhaps, there were two doses administered, those separated ulcers?

A. I do not think any one could answer that question.

Q. If mercury is administered in small doses, the suppression of urine is not so pronounced, is it?

A. If bichloride of mercury is administered in small doses over a long period of time, the suppression of urine is just as pronounced as it is from a large single dose.

Q. It would not be, right at the start, would it?

A. It would not be, right at the start, no.

Q. And, if there were two doses administered, and death ensued soon after the second dose, there would not be much time for the suppression of urine, would there?

A. Suppression of urine can come on within six to eight hours after a lethal dose of mercury poisoning.

Q. But it does not always come?

A. No, not always.

Q. Now, doctor, if a person took ten grains of bichloride of mercury in the evening, how long would you say it would be before death would probably ensue?

A. If that ten grains of mercury were absorbed by a susceptible patient?

Q. Yes.

A. Death could ensue within six to eight hours after the administration of the dose. On the other hand, patients who have been known to have that much mercury and not be susceptible, particularly patients addicted to the use of opium, and get over that much mercury.

(At this time Mr. Brewster read a hypothetical question based upon the findings made by Major Ash, Major Mahon, Col. Vedder and Dr. Muehlberger as testified by them on direct examination for the government, and at the end asked this question:)

Q. What would you say was the probable cause of death?

A. I would be unable to say.

Q. You would have no idea whether it was bi-
510 chloride?

A. I would have an opinion that the presence of mercury in those organs was presumptive evidence of mercuric poisoning.

Q. Well, can you not answer the question?

A. That is all any intelligent doctor could say, that there was a presumption of mercuric poisoning.

No body could say positively what killed a patient from these hypothetical questions I have heard. I know Dr. Muehlberger. If two-and-a-half to three grains of mercury was found in the viscera, I should say that the death was undeterminable, but that the presence of mercury in the kidney was presumptive evidence of mercuric poisoning.

Redirect Examination.

On redirect examination J. W. Faust testified as follows: One could not tell without a complete autopsy definitely

that death was due to mercuric poisoning, salvarsan so used causes death and they never discontinued it because it occasionally causes death. In a case of chronic alcoholism washing the stomach will not do any particular good and no particular harm. Mercury solution is regarded as a proper treatment for Vincents. If a patient had mercury poisoning a treatment of bichloride of mercury would be adding insult to injury.

Recross Examination.

On recross examination J. W. Faust testified as follows:

511 Salvarsan is used very extensively in the treatment of syphillis. It has been known that such small doses as three to five-tenths of a gram killed a patient, when injected into the veins. Salvarsan has no mercury.

Charles M. Stemen was called as a witness on behalf of the defendant and testified as follows:

My name is Charles M. Stemen. I am a surgeon. I practice in Kansas City, Kansas. have been for forty-four years last March. I am now a surgeon. For practically twenty years I have done surgery. Prior to that I was a general practitioner. I am sixty-four years old. I have had many an opportunity of treating mercuric poison. I am familiar with the symptoms and results. If a woman thirty-seven years of age took a dose of mercury poison or received a dose of mercury poison on May 20, 1929, and died on June 15 of the same year it would depend entirely upon the amount of the mercury given as to whether it caused her death. If she took any where from three to five grains I should say that that could occur a great deal sooner than twenty-five days. Death would have occurred earlier. I heard the questions while sitting here, you read to Dr. Faust, reciting the symptoms and history of Mrs. Shepard for the 26 days prior to death.

Q. What would you say after a consideration of those facts, and the further fact that this mercury, estimated at from two to three grains was found in the intestine, stomach, kidney, liver, spleen and pancreas and the autopsy was performed in the manner described in the question, what would you say, or have you an opinion as to what would be the cause of death?

The Court: Just answer yes or no.

Mr. Kagey: Just answer yes or no.

A. Yes, I have an opinion.

Q. What would be your opinion?

A. If these facts are as stated, it would have to be mercuric poisoning.

If the autopsy did not include an examination or removal of the brain, the heart and lungs, I do not think it could have been determined positively that mercuric poisoning was the cause of death.

Cross Examination by Mr. Brewster.

Q. Does mercury disseminate itself all through the body?

A. Yes, it does.

Q. What would the brain disclose in a mercury poisoning?

A. The brain would disclose a hemorrhagic condition.

Q. What would the lungs disclose?

A. The same.

Q. The heart?

512 A. The pericardium would show an infiltration.

Q. Those organs would contain mercury, would they not?

A. To a certain extent, but not so much as the stomach and the bowel and the liver.

Q. Then, if all the mercury was found that has been described, in the organs, then probably you would get more in the other organs than in the organs described?

A. It would merely add to the amount of the mercury; they would show more mercury had been taken, or absorbed.

Q. Now, doctor, I want to know if you were attending a patient—I guess that is not cross examination.

Mr. Brewster: That is all I wanted to ask.

Redirect Examination.

Mr. Kagey: I will recall this witness on one matter:

Q. Did you hear Doctor Strickler testify here a while ago, about the use of a stomach pump?

A. Yes, sir.

A. Assuming that the patient had the symptoms, and clinical history, that were described by Doctor Strickler, and in this case, would you, in your practice, think it would be necessary to use a stomach pump on the patient if you were called in, in that way?

A. The first thing that I—may I explain?

Q. Nobody is objecting.

The Court: Answer the question.

A. I can only answer that by an explanation.

Mr. Kagey: Go ahead, then.

A. The first thing that I would do, under the conditions of that case, would be to give a hypodermic injection of apomorphin, fill my patient's stomach as full of albuminates, whites of eggs, and things of that kind, as I could give, and, if I did not get results, I would not hesitate to put in a stomach pump.

Q. But you would not do that in the first instance?

A. No, sir.

Mr. Brewster: Did you excuse the doctor who just testified?

Mr. Kagey: He was on a case that required his attendance, and he made quite an objection to coming over here at the time he did. He had to hurry out to a sick patient. That is all.

Mr. Brewster: That is all.

Mr. Class: May it please the court, we will now call our last witness.

The Court: All right.

that kind, as I could give, and then if I did not get
513 *results I would not hesitate to put in a stomach pump, but I would not do that in the first instance.*

F. *D.* Holycross, was called as a witness on behalf of the defendant, and testified as follows:

My name is F. *L.* Holycross. I live at Fort Riley, Kansas. I am a member of the Medical Corps of the United States Army, and have been connected with the Army since August, 1917. I have been stationed at Fort Riley since July 10, 1928. I know Major Shepard. Met Major Shepard in 1922 in the Phillippines. I also knew Mrs. Shepard but I never met her until some time in July of 1928 at Fort Riley. We left the Phillippines quite some time before the Shepards. I didnt see him again until I saw him at Fort Riley about a month after our arrival. We lived in Arnold Hall and Shepards also lived there. About September 1 we moved to Carpenter Court and were neighbors after September 1. While Major

Shepard was absent in Texas we made it a point to see Mrs. Shepard, knowing she was alone in the Post and her husband away. We saw her two or three times a week. She frequently came to our house when she had a letter from the Major and let us know how he was getting on and how she was getting on. She continued to eat at Arnold Hall until Major Shepard returned in December as she stated she did not feel able to cook and did not want the odor of cooking. They had a central dining-room at that point. It was early in the fall. I do not believe I was close enough at that time to smell the odor of liquor. At family dinners at the Shepards home they served some cocktails and Mrs. Shepard participated. I recall when Major Shepard left Fort Riley for Denver some time in July of 1929 when he was taken ill I took charge of his possessions at his request in order to transfer and remove them from the quarters which he had occupied in Carpenter Court prior to that time. We packed his
514. personal possessions and had his property crated and some items moved over to bachelor apartments. In the basement of the Shepard quarters there were two or three barrels of beer bottles. Some of them were in the wash room and some in the store room. There were some bottle cases, ordinary coca cola containers. There was a blue or white crock about five gallon capacity and bottle capper and things like that in a cupboard up in the house, there was a half gallon or gallon jug about half full and also a quart bottle smelled like whiskey. In the Major's store room was a five gallon keg of wine which I helped put there some time earlier. We attempted to bottle some of it at a neighbor's place like that, and found it was not fit to use. During the time we saw them living at Fort Riley after his return I observed that all the times we visited their home Major Shepard was very considerate and kind to Mrs. Shepard. I knew Major Hawley. He was stationed at the Post during this period. I had a conversation with Major Hawley with reference to treating me for an ailment. I was convalescent from pneumonia. I had just gotten out. I met Major Hawley on the street some time in April or the first or second of May, 1929. Major Shepard had been my attending physician. Major Hawley inquired about my health and what treatment I was getting. I told him what treatment I was getting from Major Shepard and Major Shepard's opinion of my case. At that time Major Shepard was still

treating me. Major Hawley told me that I probably had an infected sinus, or an infected gall bladder, possibly some thyroid condition, that I should come up to see him at the hospital at an early date. Major Shepard was in control of my case at that time.

Cross Examination by Mr. Brewster.

Q. You say you cleaned out the cellar, in the major's storeroom?

A. I assisted the houseboy clear out the rubbish.

Q. Did you go into the major's closet?

A. I had occasion to pack all of his possessions.

Q. Did you find a little blue or brown bottle, with
515 a little liquor in the bottom of it?

A. There was a quart bottle, partly full, and also a gallon jug.

Q. Was there a colored bottle, that just had a little bit in it?

A. I do not recall having seen that.

Mr. Brewster: That is all.

Mr. Class: That is all, captain. The defendant rests.

The Government thereupon proceeded to offer its evidence in rebuttal.

J. B. Van Horn, called as witness on behalf of the
516 Government, having been first duly sworn testified as follows:

My name is Dr. Van Horn. I reside at Tucson, Arizona, and have for 18 years. I am a physician and surgeon and have been in the practice since 1905. Prior to moving to Tucson, I was in the army, in the Medical Department, and was discharged as a Captain. I was stationed one time at Ft. Whipple, Arizona. I arrived at Ft. Whipple May 30, 1917, and was discharged September 19, 1929. While at Whipple barracks, I became acquainted with Major Shepard, and Mrs. Shepard, Zenana Shepard, his wife. I knew them during the entire time I was at Whipple while I was there. I had occasion to meet the Shepards socially. They visited at our home. I would meet them some weeks, probably two or three times. There was one period during which I was confined to my house with illness, that I probably did not see Mrs. Shepard for 6 or 8 weeks. I would see Mrs. Shepard both

morning and during the day time but mostly in the evenings.

Q. State what, if anything, you know about her drinking habit.

A. I never knew her to take a drink.

Q. Did you at any time find any evidence of her drinking?

A. Never.

Q. I will ask you, if during that period you ever knew her to refuse.

A. I did.

On one occasion we were driving the mountainous road out to Prescott and my wife became rather ill, supposedly of a nervous character, when driving over the road too rapidly, and Col. Fredericks invited us into the house and brought out a bottle and proposed that we all take a drink. As I remember Mrs. Shepard was the only one who refused.

I have had occasion to meet people addicted to the excessive use of liquor. During all the time I knew Mrs. Shepard, I never saw any evidence of her being addicted to the use of liquor. In all my acquaintance with her during
517 this period I never heard of her taking a drink.

Cross Examination.

Major Shepard was at Whipple barracks about a year and a half or two years. He was Chief of the Medical Staff at one time. I do not remember that Mrs. Shepard had an attack of influenza while there. I think Major Shepard had influenza while there. I do not recall the next spring of Major Shepard going to Los Angeles. I think that I recall that Mrs. Shepard went to the coast at sometime or other. I do not know if she stayed and Major Shepard came back to Whipple barracks. Whipple barracks is about 500 miles from Los Angeles. I do not remember Mrs. Shepard's mother being there at any time.

Frances Van Horn, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

I am the wife of the witness who just left the stand. I was at Fort Whipple the same time as my husband, except the first two weeks. I was acquainted with Mrs. Zenana Shepard during her life time. We visited at her home.

Q. How frequently did you visit at her home?

A. Quite a bit. I would see her most any time, morning,

noon or night. Sometimes we would visit her two or three times a week, and sometimes less often and sometimes more often.

Q. During this period did you ever know of Zenana Shepard drinking any intoicating liquors to any extent.

A. I did not.

Mrs. Shepard visited at our home and we were out at other people's homes at social gatherings, at different times. I never at any time, at any time of those times, saw her when she was under the influence of liquor.

Q. Did you ever smell any liquor on her breath?

A. Never.

Q. Did you ever in all the period you knew her ever see any indication that she was addicted to the use of liquor?

A. Never.

She was a very beautiful woman with extremely clean skin, very clear eyes, beautifully dressed, I will say, immaculately dressed. I never saw her when she was bleary eyed,
518 or had drooping jaws. I remember the trip in the mountains my husband, spoke of, very clearly. There was liquor taken at that time. Zenana did not drink.

Cross Examination.

I remember Mrs. Shepard being ill while there. We had so much illness at the post at that time I could not say definitely for how long. Our Commanding Officer died at that time. I remember Mrs. Shepard going to Los Angeles. I will not say definitely whether she went back with the Major, and I will not say that they came back together. I did not hear Major Shepard's testimony on the witness stand yesterday morning, that at Whipple barracks was the only place Mrs. Shepard did not drink. I think that happened before I came into the court room.

Geo. Alfred Skinner, called as a witness on behalf of the Government having first been duly sworn testified as follows:

I rank as Colonel in the Medical Corps of the United States Army and have been stationed at Omaha, Nebraska, nearly four years. I knew Mrs. Shepard and I know Major Shepard. I joined there in February of 1927 and shortly after that Major Shepard and his wife called on us. I was there at Omaha from that time until the Shepards left. I never saw

any evidence of Mrs. Shepard being addicted to the use of intoxicating liquor. I never suspected.

Cross Examination.

On cross examination George Alfred Skinner testi-
519 fied as follows:

I never visited Mrs. Shepard in the morning at her home. I was her husband's superior officer. It was against the regulations to drink in the Post.

Redirect Examination by Mr. Brewster.

Q. Being against the regulations, doctor, if there had been any excessive drinking on the post, where a person was intoxicated for days, and laid around with drooping jaws, and bleary-eyed, you would have been pretty apt to hear it, would you not?

A. Why, I would have expected to have heard something about it.

Mr. Brewster: That is all.

Recross Examination by Mr. Kagey.

Q. You never heard anybody gossiping about Mrs. Shepard drinking, did you?

A. I never did.

Q. Were you in the courtroom when the witnesses testified about Mrs. Shepard carrying her liquor so it was not discernible to the ordinary person?

A. I heard the testimony yesterday, only I heard that particular testimony.

Q. You say, you never saw her when you thought she was under the influence of liquor?

A. That is what I said.

Q. You did not pay any attention, in that particular respect?

A. No, but I think, if there had been any evidence of liquor, I probably would have noticed it.

Q. You did not pay any attention to any of the other officers' wives' appearance, as to drinking?

A. One rarely sees that on social occasions.

Q. It was against the regulations to have it on posts of the United States Army?

A. Yes, of course, the military posts.

Q. Yes, that is what I thought.

A. Of course, there are other social occasions.

Mrs. Georgianna Skinner, was called as witness on
520 behalf of the Government, having been first duly sworn, testified as follows:

I live in Omaha, and am the wife of Colonel Skinner
521 who just testified. We were at Omaha and met the Shepards in Omaha the first month they came. They made their courtesy call on us as is customary in the service. I do not know when they left, but we knew them up until the time they left. I met Mrs. Shepard socially during that time repeatedly. The number of times varied on the times of social functions. In the winter I met her frequently, and I met her both on and off the post at social gatherings. I met her at her home, and she came to our home at social functions.

Q. Did you ever see any evidence of her using intoxicating liquor?

A. No evidence so far as I know.

Q. Did you ever see anything?

A. I say I did not.

Q. Did you ever notice anything?

A. No symptoms of liquor.

Q. Yes?

A. No.

Q. Did you ever see her take a drink?

A. Not so far as I remember.

Q. Did you ever see her when she seemed to be under the influence of liquor?

A. No, I never did.

I think she was unusually fastidious about her appearance, very immaculate and dressed very immaculately, and about the care of her person in every way, a woman of great charm of manner, they were both ideal hosts, Major and Mrs. Shepard.

Cross Examination.

I never saw any trouble between them.

Martha Miller, called as a witness on behalf of the Government, having first been duly sworn, testified as follows:

My name is Martha Miller. I live at Omaha and am a graduate nurse, and have been for 10 years. I am still at Omaha. I knew the Shepards while they were in Omaha, and was in their home for a period of 13 days taking care of Major Shepard. Mrs. Shepard was there at the time. During that time Mrs. Shepard was anxious about him and interested in him. She helped take care of him. During that
522 time I had the afternoons off, and aside from that I was constantly in contact with Mrs. Shepard during those 13 days. I met and was with Mrs. Shepard in the dining room and in the meals and at different places in the house and about the work. During that time Mrs. Shepard never took a drink. I did not ever see any indication that she was addicted to the use of whiskey. I have been a trained nurse, and have had some association with liquor addicts. I have had occasion to nurse patients who were addicted to the use of liquor. It was in 1928 that Major Shepard was sick. During all the period I was there I never saw any evidence that Mrs. Shepard was in any way addicted to the use of intoxicating liquor. I never smelled liquor on her breath. Mrs. Shepard helped take care of the house; they had a Filipino boy.

Q. Is that the same Filipino boy that is here?

A. No, sir.

Q. That was another one?

A. Yes, sir.

I never did see anybody bring any liquor into the house. I never did see Mrs. Shepard make any trips away to other parts of the house and come back with liquor on her breath.

Cross Examination.

I have had experience with people who drink liquor secretly. It is not necessarily one of the main symptoms of a person who drinks liquor secretly or a dipsomaniac to conceal the fact that he or she srinks.

Redirect Examination.

I never saw anyone who was addicted with excessive drinking who was able to successfully conceal it.

Recross Examination.

I was there for 13 days. Major Shepard had an attack of pneumonia. I was the only nurse on the job. I was taking care of him all the time. I was not trying to smell anybody's breath or to see if anybody took a drink while my back was turned.

Q. Until the Government agents saw you in this 523 case you never suspected anybody drank liquor there?

A. No.

Q. You say that Cenon Manaloto was gone while you were there? Was he gone all the time you were there?

A. It was a different Filipino boy than they had before. As far as I recall Mrs. Shepard said she had been doing her own work while the other Filipino boy left; she was doing her work and the Major was sick, and she could not take care of the work, and take care of the Major, and the Major was let out under the Doctor's orders. Then she told the Doctor he would have to get a nurse and I was called. The Major was not terribly or dangerously sick.

Q. How did he and his wife seem to get along?

A. Very nicely.

Q. You never saw the Major out of humor or angry with her?

A. He was irritable occasionally.

Q. Not any more than any other two people?

A. No.

Helen Austin, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

My name is Helen Austin, of Towson, Maryland. I am the wife of Colonel Austin, connected with the Army. I am a native Kansan, and am a daughter of Colonel John Atwood, the attorney. My husband and I were stationed at Omaha from 1926 to 1929. I was acquainted with Mrs. Shepard over two years which was all that time at Omaha. I did not frequently visit Mrs. Shepard. I frequently met her at card parties and social functions. I never at any time saw her under the influence of liquor. I never smelled liquor on her breath.

Q. Mrs. Austin, did you know of her fancy work?

A. Yes, I did.

Q. How was she at that time as to doing fancy work?

A. Mrs. Shepard was very much interested in sewing and fancy work and did very beautiful work and—

Q. Do you know of her making her own gowns at the time?

A. Yes, I knew she made some very lovely things.

Q. Did you ever see any of her fancy work?

524 A. Yes, I did.

Q. How was it as to being good—

A. It was exquisite work.

I do not know how long she was doing that work, but I know she was very much interested in it and exchanged patterns with other ladies, and other things of that sort. I examined the work. As to her personal appearance she was a very attractive woman. In fact, very beautiful. I never did hear any rumors around the Fort as to her being an addict of liquor.

Cross Examination.

I was not intimately acquainted with Mrs. Shepard. I remember the time Mrs. Shepard was not well. I do not remember her missing card parties because she was sick and other people being invited in her place. She was a delicate looking woman. I did not know what the cause of her illness was. Sometimes the card parties we attended were at the Fort and some of them were in the city. We belonged to the same bridge-luncheon club. It was not permitted to serve drinks at these card parties at the Fort. All the parties were not at the Fort. They never had liquor at the card parties. These were formal affairs. I visited at her home informally when I was shown this fancy work. I could not say how many times I was at her home.

Q. She was a mere acquaintance, was she?

A. Yes, sir, she was. We never ran around to parties. We lived in different parts of the city and all that sort of thing. We went with a different crowd.

Clara Brown, called as a witness on behalf of the Government, testified in rebuttal as follows:

I was the nurse who nursed the deceased Mrs. Shepard. I was on the stand on direct examination by the Government. I was there from the first day until she died except such time

as I took off. I testified with reference to some capsules. There were some bismuth capsules. Major Shepard said it was bismuth. There were some that he said were sodium bicarbonate and luminol. He said to give the soda and luminol one at a time. There was one bottle of the mouth wash all told. One bottle that I saw. It came there June 1. I saw all that was used. About half of that bottle was used.

No more than that. When I would hear some one com-
525 ing I thought was Captain Rose or when Captain Rose was coming I would prepare the medicines and get them all out on the table for him. I would always put it away afterwards. I did not leave that solution of bichloride where Mrs. Shepard could get to it, while I was gone. It was never used, regularly. It was finally stopped after death. The trouble I didn't use it regularly she rebelled. There was peroxide in it and when she would take it, it would foam. She didn't swallow it. She would spit it out.

Q. Did you ever have any talk with her about her condition?

A. I did.

Mr. Kagey: Just a moment; just a moment—

Mr. Brewster: Q. Was there anything said to you by her as to whether she desired to get well or not?

Mr. Kagey: Just a moment.

A. Yes.

Mr. Kagey: Wait a moment, until I get my objection in. We object to any conversations had not in the presence of the defendant, not proper and not rebuttal, no conversations having been asked for in this question, this conversation reciting about her have a conversation—

The Court: No, it did not, it asked her if she had such conversations, and she answered yes, and the conversation was not asked for, and counsel ought to be able to hear that answer.

Mr. Kagey: I did not hear the question.

Court: Yes.

Mr. Kagey: Note an exception.

Mr. Brewster: Q. Did you have any conversation with her with reference as to how she took sick? Answer "Yes" or "No".

A. Yes.

Q. What was it?

Mr. Kagey: Wait a moment; we object to that as improper and hearsay.

Mr. Brewster: If you object to it, we withdraw it.

Mr. Kagey: We certainly object as to any conversation with this witness.

Mr. Brewster: I think the testimony between this party and the other which was admitted on the statement as part of the res gestae, anything that was said—

Mr. Kagey: It could not be part of the res gestae.

The Court: This question was withdrawn; so go ahead.

Mr. Brewster: Yes, I withdrew it.

Q. Did she tell you and relate to you the circumstances under which she was taken?

The Court: Just answer "Yes" or "No".

Mr. Kagey: Wait a moment—

The Court: Just answer "Yes" or "No".

A. Yes.

Mr. Brewster: Q. What were they?

Mr. Kagey: Wait a moment; we object to that.

The Court: You may answer.

A. About the second day I was there—

Mr. Kagey: I save an exception.

A. (Continuing) —she asked me if I would do her
526 a favor. When I consented, she told me to go into Major Shepard's room and get a whiskey bottle off the shelf in his closet. I did. She asked me to smell the contents. I did so. She then asked me if it smelled peculiar. I told her I did not know. She asked me how much was in the bottle. I noticed there was about a tablespoonful and told her. She then stated she knew there could not be but a small amount, because the next to the last time she had taken out of that bottle, there was only about enough for another drink, and she was going to save that as what she wanted. She then stated this was the bottle from which she drank before she collapsed on May 20, and she asked me to put it back where I found it, so Major Shepard would not know she found it. I did. When I returned to her bedside—

Mr. Kagey: Just a moment; just a moment, we object to any further conversation.

The Court: Were there further conversations?

The Witness: Yes.

The Court: Concerning the same matter?

The Witness: Yes.

The Court: You may state.

A. (Continuing) When I returned to her bedside, she said, "Doctor Shepard had poisoned me."

Mr. Kagey: Now, if the court please—

The Court: Just a moment—

Mr. Kagey: I beg your pardon—

The Witness: —was going to die. That was all at that time.

Mr. Kagey: We move to strike out all the testimony of this witness, and ask that the jury be instructed to disregard it as a conversation occurring in the presence of the defendant. Then I have a motion.

The Court: Overruled.

Mr. Kagey: Very well, we now move that the jury—

The Court: Just a moment.

Mr. Brewster: I should like to withdraw that at this time, and I want to ask her some more questions.

The Court: Very well; that will be withdrawn and stricken from the record, gentlemen of the jury.

Mr. Kagey: May we now move that the jury be discharged because of the reception of illegal and improper evidence before the jury, evidence of this kind being, in the opinion of counsel—

The Court: Overruled.

Mr. Kagey: We note an exception.

Mr. Brewster: Q. Did you bring a bottle to her.

A. I did.

Q. What did you do with that bottle?

Mr. Kagey: We object to this as not proper rebuttal.

The Court: You may answer.

Mr. Kagey: We except.

Mr. Brewster: Q. What was done with it?

A. I put it back where I found it.

Q. Did you see it again?

A. I never did.

Mr. Brewster: That is all at this time. I should like to think about that other; I do not want anything in that is not proper, and I have some doubt about it.

The Court: I have not any doubt myself, but counsel may withdraw it if he desires.

Mr. Kagey: We except to the remarks of the Court, in the presence of the jury, about his opinion of the competency of the evidence.

The Court: The evidence has been stricken, gentlemen of the jury, and will not be considered by you, and, since it is stricken out, counsel will stop argueing about it.

Mr. Kagey: We note an exception.

Mr. Brewster: You may cross examine.

Cross Examination.

Clara Brown: I heard the testimony of Major Rose.
527 In some respects I know he was mistaken about the way he treated that case. I am a trained nurse. I am nursing now in Topeka.

Q. Did you tell Major Rose, or any other Doctor in attendance that the orders for the use of the mouth wash were not being carried out by you?

A. Yes, Captain Rose asked me and I told him they were not.

Q. When did you tell him that?

A. When he asked me if I was using it every two hours. I was there all the time except my hours off. I had hours off part of the time. His instructions were not carried out because it was impossible. It is my practice to follow the orders of the physicians in cases I am nursing as nearly as possible.

Q. Did you ever tell him more than once that you were not carrying them out?

A. He knew that I was not. I do not know whether I told him or not.

Q. You say he knew you were not carrying them out? Did you see him administer this medicine himself when he came there?

A. Once daily.

Q. He testified he was there twice daily.

A. Part of the time.

Q. You saw him administer it?

A. Yes.

Q. Did she make any objection when he was administering it?

A. She objected, yes.

Q. Did she object after the one time?

A. Yes.

I do not remember hearing him telling her that the medicine was doing her good, that her mouth was getting better. I did not say I did not know if he was mistaken about that.

I do not remember telling anybody else besides Major Rose that I was not giving her this treatment.

Curtis McCoskey, called as a witness on behalf of
528 the Government in rebuttal, having been previously sworn, testified as follows:

I am the brother of Zenana Shepard. I was in the court room when Mrs. Custis testified. She lives in Glendale, California, on Atwater Street. She has been there since September, 1926. My sister visited in Los Angeles on several occasions. I believe she spent some little time with us while he was stationed at Whipple Barracks. Spent as I recall it, two or three weeks upon her return from the Philippines, and in 1926 I believe she came in late summer or the middle of the summer and stayed until just before Christmas. It is possible she was there one or two other times, but I do not recollect at this time. She spent her entire time with
529 the family, between Mother and we boys until later after I was married and my wife and her friends. On two or three occasions when Ted or myself drove her over to see Grandmother she visited for an hour or so. Other than that I have no recollection of her visiting. I never heard in my life that she became violent through the use of liquor or any other means, and was restrained. Q. Would you know what date she was at your place? Of course I can only speak of the time she was with us, while she was on these visits with us. With reference to noticing anything about her drinking, only to this extent, at the time or about the time she married Major Shepard we had occasion to have dinner together with the Major and my sister, and as I recall it there were cocktails served on these occasions. I would say all told I have seen my sister take not more than half a dozen drinks on occasions since when she visited us. I never saw her under the influence of intoxicating liquor. She corresponded with the family. Her letters were addressed to Bud and Betty. She always called me Bud and Betty is my wife.

Q. I hand you a letter marked Government's Exhibit 87, bearing postmark May 4, 1929, and ask you if that is a letter you received from your sister about that time?

A. Yes; yes, it is; I remember the letter.

Mr. Brewster: We offer this exhibit in evidence, for the

purpose of showing the condition mentally of Mrs. Shepard in May, 1929.

Mr. Class: Mr. Brewster, can we agree on the date of this postmark; I do not see any on the letter.

Mr. Brewster: May 4, is it not.

Mr. Class: May 4.

Mr. Brewster: Yes, May 4, 1929.

Mr. Class: Have you got a translation of this, Mr. Brewster?

Mr. Brewster: No, I have not. I can read it.

Mr. Class: Have you got a typewritten copy?

Mr. Brewster: No.

Mr. Class: May it please the court, defendant makes the formal objection to the reception in evidence of Government's Exhibit 87, for the reason that it is incompetent and immaterial, as to any communications, whether oral or written, which Mrs. Shepard had with this witness, and that it does not tend to prove or disprove any issue in the case. So far as its contents are concerned, there is no particular objection on the part of the defendant, but we say that this is in the same category as what was attempted to be done a few minutes ago, as to relating some conversation in the absence of the defendant.

Mr. Brewster: There is nothing in the letter that relates to the case.

Mr. Class: We make no objection to the contents, as such, but we make the formal objection that any communication with the brother, prior to the death, is not competent or material. There is nothing in the letter, to our minds,
530 that proves or disproves anything.

The Court: What is the court to understand, then, that you do object to it, or you do not object to it?

Mr. Class: We object to it on the ground that, as stated, it is incompetent, irrelevant and immaterial, a communication made by Mrs. Shepard, in writing, to the witness, and nothing to show that Major Shepard was present, or anything about the contents. That is the strictly legal objection which the defendant makes in this case, and would fall in the category of purely hearsay.

The Court: It was about ten days?

Mr. Class: This is May 4.

The Court: Sixteen days before?

Mr. Class: Sixteen days before, yes, sir.

The Court: Well, there is no objection to the contents. It will be received.

Mr. Class: Save an exception.

(Government's Exhibit 87 marked and received in evidence, and made a part hereof, being in words and figures, as follows, to-wit:)

Government's Exhibit 87.

"Dear Bud & Betty: Was so happy to get Betty's letter telling me all about Betty Jane. Would certainly like to see her. She will be walking every place soon now. Know you are having a busy time training her, but as clever as she is it wont be very long before she understands. It certainly takes many little panties until you accomplish your purpose, and then I imagine it means about two pair a day. The little toddle suit looks dear. She looked quite heavy in her pictures. What size does she wear: 1 year old?

"Can just see Betty & Ross with their new baby. That seemed *to all* they needed to make their little home complete. Have never forgotten how beautifully they entertained us.

"Oh must tell you Betty, about your recipe for cabbage balls. There are a couple of ladies on the post that like cabbage as I do and their husbands wont eat it any more than mine. Had one table of bridge the other day and fixed a raft of cabbage balls, I thought, but didnt have ½ enough, and they are the rage now, on the post.

"Am enclosing a small check for Betty Jane for her birthday. If there is anything you rather she had than pearls for necklace, use it as you see fit. Am sorry it is not much larger, but hope by this time next year to do much more for her.

"Curtis is the busy man. Wish some of his trips brought him further east than Salt Lake. Would so like to see him, if he gets any nearer.

"Havent any news. Things are running along just the same. Dr. gets up every a. m., the minute the paper comes, and looks for orders, but there isnt a chance unless the Wainwright bill goes thru during this session.

"Had a letter from mother saying Curtis had called and took her for a ride and she was so sorry not to be in as she loves every minute she has with you and the baby, and I am sorry too, as I always get a long letter telling me all about it.

"Betty dear, you seem to be feeling pretty good, better than

when you carried Betty Jane. You accomplish so
531 much. If you have a little pattern for dresses and toddle suits for Betty Jane and need more I would be so glad to make them. I bought a little pattern for a dress 1 year old but it looks large enough for a 4-year old child. If you will send me the numbers I can get the patterns and tell me how many and what you want. Would be so glad to do it. If I could see Betty Jane would know so much better what to fix for her. Please tell me what you need for this dear new baby. Do you need little kimonos, gowns or what new you would like that you might have to make yourself and I would be so glad to do. *Don't what* you have but if I had something definite to work on it would be so much easier for me. I have to send to Omaha for everything but I have to have some idea of what I want. There isn't a chance of making a selection here.

"This ceases to be a letter, is verging on a book, so will close. Hope you have time for another letter real soon. A big kiss for Betty Jane and love to you all.

ZENANA."

(Envelope)

"Mr. & Mrs. C. H. McCoskey, 1220 S. Messalin, Los Angeles, California.

"From Mrs. C. A. Shepard, Apt. 3A Carpenter Ct., Fort Riley, Kansas."

Mr. Brewster: I want to pass this for the inspection of the jury.

Q. I hand you a letter bearing postmark of February 28, 1929, and ask you if that letter was received by you?

A. Yes it was (examining paper).

Q. In whose handwriting is the envelope and the letter?

A. That of my sister, Zenana.

Mr. Brewster: We offer this exhibit in evidence as No. 88. It is offered for the purpose of showing her mental condition and state of health.

Mr. Class: May it please the court, defendant objects to the reception in evidence of government's Exhibit 88. Counsel has stated it is dated February 28, 1929. It could not possibly have any bearing on the issues of the case here. It is incompetent, irrelevant and immaterial, and simply an encumbrance of the record. That was two months before Mrs. Shepard died.

The Court: Let me see it. (Examining paper.) It will be received.

Mr. Class: We save an exception.

The Court: Yes.

(Government's Exhibit 88 marked and received in evidence, and made a part hereof, and read by Mr. Brewster, being in words and figures as follows, to-wit:)

"Dear Curtis & Betty: Know you think me terrible not writing sooner, to thank you for my lovely birthday. It was just too pretty. Am so sorry I didn't have gifts for Curtis' Kitty but I just tho't by being careful I could just get straightened up in a hurry and really felt I was making wonderful progress. Came home the other night to find a soldier had made the rounds of Carpenter Court and
532 stolen clothes—all my Summer things disappeared, also my kimono. I was pretty discouraged but will make the grade yet.

"Kitty has told me so much of your pretty new home and know how attractive it must me. Has Betty Jane fallen in the goldfish pond as yet? She must be a darling. You have no idea how much I have enjoyed your pictures. Do wish I had one of Kitty.

"Sorry I haven't lots of news for you, but my life is so simple keeping house and 3 meals a day. Play one table of bridge once or twice a week and that is about all. We haven't finished our calling yet and don't know when we will as we can only call two nights a week and the Dr. has lectures one night and is O. D. every 6th night.

"Doctor is still waiting for Congress to do something for the Medical Corps but it seems very slow. Suppose we are stuck here for our 4 years. Give Betty Jane a big kiss for me and will try to do better next time.

"Best love to you and again many, many thanks.

ZENANA."

(Envelope)

"From Mrs. C. A. Shepard, Apt. 3A Carpenter Ct., Fort Riley, Kansas.

"Mr. & Mrs. C. E. McCoskey, 1220 S. Messalin Ave., Los Angeles, California."

On cross examination Curtis McCoskey testified as follows:

I talked with Mister Caffrey, one of the Government agents. I cannot tell when it was. It was this spring some time. That was possibly along about last June.

Redirect Examination.

Q. I hand you paper marked government's Exhibit 89, being a letter marked May 30, 1928: Did you receive that letter?

A. Yes.

Q. In whose handwriting is it?

A. It is in my sister's.

Q. You got it in that envelope?

A. Yes, correct.

Mr. Brewster: We offer government's Exhibit 89 in evidence.

Mr. Class: May it please the court, the defendant objects to the reception in evidence of government's Exhibit 89, for the reason that it is incompetent, irrelevant and immaterial, and does not to prove any issue in this case, and is too remote. As I understand it, the postmark is May 30, 1928.

The Court: Let me see it. Preliminary questions were asked with reference to matters at Omaha. (Examining paper.) It will be received.

Mr. Class: Save an exception.

The Court: Yes.

Mr. Brewster: This letter is dated May 30, 1928, from Omaha, Nebraska.

(Government's Exhibit 89 marked and received in evidence, made a part hereof, and read by Mr. Brewster, being in words and figures, as follows, to-wit:)

Government's Exhibit 89.

"57 St. Edmunds Drive, Lawrence Park, Toronto, Canada.
"Mrs. C. A. Shepard, Fort Omaha, Omaha, Nebraska.

"Dear Curtis & Betty: Letters from mother and
533 Kitty today tell me you are not feeling so well. Do hope when this reaches you, you will feel lots stronger. Take things easy until you regain your strength. Write and tell me just how you feel. I am so interested in everything. Only wish I could be there as I feel there might be many things I could do to help you just a little. If we were only going to California instead of Canada I could hardly wait to start. As it is I am not very interested, only in having Dr. get in good shape for the school, on the chance it may mean Riverside for us.

"How is that dear Baby? I would so love to see her when she is tiny. Mother says she is a darling.

"We leave Friday a. m.—so will be busy packing and storing our trunks tomorrow and want to get some rest Thursday.

"There isn't a bit of news—just wanted you to know we were thinking of you all—let me hear from you when you feel like writing.

"Love to all and a big kiss for Betty Jane—Zenana."

(Envelope)

"Mrs. C. E. McCoskey, 4170 Harvard Bld., Los Angeles.

"From Mrs. C. A. Shepard, Apt. 3A Carpenter Ct., Ft. Riley, Kansas."

Kathryn McCoskey, called a witness on behalf of
534 the Government, having been previously sworn and examined, testified as follows:

I am not Mrs. L. C. McCoskey. Mrs. L. C. McCoskey is Mrs. Curtis McCoskey, Mrs. Shepard's mother. Mrs. Shepard's mother did not live with us in 1929. The letter handed me with a post mark 1929, I know of that letter coming. Mrs. McCoskey put that date on the top. It is in her handwriting.

Q. I notice this is mailed May 21, 1929, and you got it a few days afterward?

A. Yes.

Mr. Brewster: I have been referring in my questions to the government's Exhibit 90. We offer such exhibit in evidence.

Mr. Glass: May it please the court, defendant objects to the reception in evidence of government's Exhibit 90 for the reason that it is incompetent, irrelevant and immaterial, not tending to prove any issue in this case. It is hearsay, pure and simple, and an epistle written under the testimony of the witness by Zenana Shepard to Major Shepard, and nothing to show that Major Shepard knew anything of the letter prior to its dispatch, or knew anything of its contents, and for the further reason that it is not addressed to the witness, but to Mrs. L. C. McCoskey; it does not tend to prove anything; in fact, it is hearsay, and in the same category as all these other letters. Just a moment, may it please the court, and we will add this further, that it appears on its face not

to be in the handwriting of Zenana Shepard, as compared with these others.

The Court: Is this in the handwriting of Mrs. Shepard?

The Witness: It is, yes.

Mr. Kagey: There seems to be two or three different handwritings in the letter.

Mr. Class: We will add this objection, under the testimony, so far, it shows, if anything at all, that the letter was written after 20 of May, and in accordance with the testimony of Dr. Strickler, she was picking things out of the air.

The Witness: No, May 20.

The Court: This May 21 up here is not a part.

Mr. Brewster: No, May 19, written on May 19.

Mr. Kagey: It was written on May 19.

Mr. Brewster: Apparently, May 21 was written on Sunday.

Mr. Kagey: It says May 21.

The Court: That is the receipt.

Mr. Kagey: This ought to be stricken out.

The Court: Yes.

Mr. Kagey: That is why I did not understand it. I do not think we have any objection to this letter.

Mr. Class: No, sir, we object to it on the ground I have stated.

Mr. Kagey: All right.

The Court: Well, it will be received.

Mr. Brewster: I am reading now letter bearing postmark of May 21.

The Court: How is that?

Mr. Brewster: It bears the postmark.

Mr. Kagey: Written on Sunday.

The Court: Dated the 19th.

Mr. Brewster: It is not dated at all. Mailed May 11.

The Court: Oh, yes.

Mr. Brewster: May 21 was Tuesday. Taken sick on Monday and she was writing them the letter it shows
535 on its face, on Sunday.

Mr. Kagey: The Sunday before she took sick.

(Government's Exhibit 90 marked and received in evidence, and made a part hereof, and read by Mr. Brewster, being in words and figures, as follows, to-wit:)

"May 21, 1929.

"Mother dear: Your sweet letter came a few days ago and meant to answer it before this. Doctor has been 'sick

in quarters' for two days, just a heavy cold, and feels fine tonight. Will be on duty tomorrow.

"Note what you say about Mother's day. Cant imagine you being happier than to have had a lovely day with Betty and Curtis and Betty Jane. I know Mother dear, one more thing could have made you happier, but now, please know, that Ted loves you dearly. We all make mistakes, but never could you make me think or believe there is anyone who means more to these boys than their mother.

"It is very hard to write as things are so often misunderstood. I have been looking for a letter from Ted but imagine he is quite busy these days. I do hope this new business will work out well for him. I think he has many things on his mind just now, and when he finds the thing he is really interested in there will be no stopping him.

"Am returning the pictures you inclosed some time ago as Aunt Lillian sent me one. You look so well and years younger than Aunt Lillian.

"Had a lovely letter from Marion. Her one grief seems to be 'what will we eat next' and I can sympathize with her. Mr. S. too, seems to know better than anyone else how to plan meals. Never will I forget the lovely meals I had with you all and in that pretty home. Would like to step out in the back yard and pick an orange or grapefruit. I get very lonesome for California 'now and then' but we are having delightful weather here now so cannot complain.

"Had a letter from Kitty this a. m. and I will write her in *a a* day or so.

"Haven't one bit of real news for you. The measles and mumps have the post fairly well subdued. Dr. has had an average of 30 to 35 calls a day, has been going night and day. He took the cold and was very tired besides, but two days have put him right on his feet. He wants to go some place tonight; with floods all around us there isn't a chance of getting more than three miles out of town. No picture shows open on Sunday in this state, so think I'll stay home and sew or read.

"This is the poorest sort of a letter but just wanted to drop you a line to let you know we are all o. k. Will do better next time.

"Best love and give Betty Jane a big kiss and hug for me when you see her.

ZENANA."

(Envelope)

"War Department. Mrs. C. A. Shepard, 3A Carpenter Ct., Ft. Riley, Kansas.

"Mrs. L. C. McCoskey, 2244 Crenshaw Blvd., Los Angeles, Cal."

(Postmark:) "Junction City, Kansas. May 21, 2:30 p. m., 1929."

Mr. Class: May I have the jury inspect it?

536 Mr. Brewster: Yes.

Mr. Class: So long as it has been received in evidence.

Mr. Brewster: If they want to compare it with these other handwritings, there is no objection. Look at them all.

After I got to the home of my brother-in-law and sister-in-law I saw this mouth wash. It was not kept on the table all of the time. Mrs. Shepard did not use it, or permit its use.

Q. Do you know how much the bottle had in it when you first saw it.

A. I believe some of it had been used before I got there. I do not know how many bottles had been there before I came, after I got there Mrs. Shepard could not use it. I do not remember the visit of Zenana Shepard to her home in California. That was before I was married. I visited her in Omaha on my honeymoon. We were there for about 8 or 10 days and Mrs. Shepard and various friends of Major and Mrs. Shepard's entertained for us. Mrs. Shepard was sober every minute that I was with her. During those 8 days I never did see her when she had bleary eyes and drooping jaws. At some of these parties we went to at that time, cocktails were served and I never saw Zenana take a drink. After I got there (Fort Riley) I was constantly with Mrs. Shepard every day and I never did hear her say anything or indicate in any way she did not want to get well.

Cross Examination.

I came to Ft. Riley on June 11, and Mrs. Shepard died on June 15. When I was there in June at the time she died I was not with her every minute of the day.

Q. You were out for an hour or two?

A. Yes, we were out.

I never saw Mrs. Shepard in Los Angeles or San Pedro. The first time I saw Mrs. Shepard was in December, 1927. I believe I have met a woman by the name of Gene Shassere,

but she was never in my house at dinner. I met Mrs. Shassere at dinner one night; I do not remember if Mrs. Shepard was discussed or not.

537 Q. In order to refresh your recollection, did you not at that particular occasion have a conversation with Mrs. Gene Shassere, in which you stated to her that you and Zenana had gone to a fortune teller on the Board Walk at San Pedro, California?

A. Judge Class, I have just testified I have never seen Mrs. Shepard in Los Angeles. The only time I saw her, until I came to Ft. Riley at her death, was in Omaha in 1927.

Mr. Class: —Just a moment.

Q. And this conversation having taken place after the death of Zenana Shepard, in which you said to her that you and Mrs. Shepard had gone to a fortune teller on the Board Walk in San Pedro; that this fortune teller at first had refused to read Mrs. Shepard and finally said that it was so dark and terrible and that you said to Mrs. Gene Shassere at that time and place, this seemed to pray on Mrs. Shepard's mind quite a lot and you told Mrs. Shassere that you believed Zenana drank extra hard because of the fear of what this woman had told her, and you blamed yourself for going there with Zenana?

A. No.

Q. Or such in substance?

A. No.

Q. Was there any mention about any fortune teller?

A. I said that I had been to a fortune teller. I never have been to a fortune teller with Mrs. Shepard.

Q. So your answer to my question is "no"?

A. No; Mrs. Shassere has that all garbled.

I had a talk with Mr. Caffrey about the death of Mrs. Shepard when he came to Los Angeles; I do not remember the date but it was during his first visit.

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538 J. C. Gresser was called as a witness on behalf of the government and testified, in rebuttal, as follows:

After the death of Mrs. Shepard some slides came into my possession. My laboratory assistant gave them to me and told me that Major Dye had taken the specimens the night before.

Q. State whether or not you found any indication of the germ, or whatever you call it, of Vincent's angina?

* * * *

A. Out of three slides I examined, I found considerable spirochaeta on it.

Q. Anything indicating Vincent's angina?

A. Not in large enough numbers, in my opinion.

Q. Do you know whether they were spirochaeta of angina?

A. They looked like it.

Q. What?

A. They looked like it.

Q. Was there some discrepancy in that?

A. The curves in them were not typical.

Q. What do you call those things?

A. Spirochaeta.

You will find these spirochaeta in about eighty percent of normal mouths, and you find more than were on that slide and more. I had a conversation with Mrs. Shepard about May 25th, about four or five days after she took sick, relative to her symptoms.

Q. Did she, at that time, detail any symptoms at all?

A. Yes, sir.

Q. What did she tell you?

Mr. Kagey: Just a moment; we again object; this woman had six doctors, she did not have to detail symptoms or hold conversations with anybody else about her illness, and not shown to have occurred in the presence of the defendant, and hearsay.

The Court: You may answer.

Mr. Kagey: We except.

A. Yes, sir, she told me she believed she was being poisoned, and asked me if I could run some whiskey for arsenic that she had.

Mr. Kagey: Wait a moment; we move to strike out the testimony of the witness as incompetent, prejudicial, hearsay, not in the presence of the defendant, being matters of opinion, and not statements of fact, and not tending to prove or disprove any of the issues.

The Court: Overruled. Is that all?

Mr. Kagey: What is that?

The Court: No cross examination?

Mr. Kagey: We have moved to strike out. I move to

strike it out, did I not? I do not think I should cross-examine after I move to strike it out.

The Court: Very well, you will be excused.

Mr. Kagey: I note an exception.

* * * *

Q. Did she make any statement in reference to the amount you would have to have?

A. Yes, sir.

Q. What did she say?

Mr. Kagey: Wait a moment; amount of what? We object to this—

Mr. Brewster: You better go back.

The Court: Yes, you better come back to the stand.

Mr. Brewster: I will ask the question again: Q.
539 Did she make any additional statement in reference to this matter?

A. Yes, sir.

Q. What did she say?

Mr. Kagey: We object to this as hearsay, not occurring in the presence of the defendant.

The Court: She may answer.

Mr. Kagey: We except.

She wanted to know how much whiskey it would take to run for arsenical poison, or other kind of poison, and I told her it would take approximately three ounces.

Mr. Kagey: We object to that question also and move to strike it out, and also the answer, upon the same grounds. I did not have time to state it. We move to strike out the answer as hearsay, not occurring in the presence of the defendant.

The Court: It may stand.

Mr. Kagey: We except.

Mr. Brewster: Q. What did she say then?

Mr. Kagey: We object to this question for the reason that it would be hearsay, not occurring in the presence of the defendant, and incompetent under any theory.

The Court: He may answer.

Mr. Kagey: We except.

A. She said there was not enough whiskey to run for that, —to let it go.

Mr. Kagey: Move to strike out the answer,—

Mr. Brewster: That is all.

Mr. Kagey: —as hearsay, incompetent, and not made in the presence of the defendant.

The Court: Overruled.

Mr. Kagey: We except.

Cross Examination.

I am not a physician. One of the attorneys for the defendant asked to interrogate me about the facts in this case, since I came here and I did not refuse to talk to him.

Q. What did you tell him?

A. He wanted an interview with me, I told him he could have it at any time; he wanted me to miss my lunch and go with him; I told him I would not do it.

I do not know Mr. Caffrey but I know Mr. Glass.

Mr. Kagey: That is all. We now move to strike out all the testimony of this witness as hearsay, not occurring in the presence of the defendant, incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Kagey: Exception.

Theodore H. McCoskey was called as a witness on behalf of the government and testified, in rebuttal, as follows:

I was living there in California with my grand-mother when my sister visited there about twenty years ago. I heard my grand-mother testify about her being there and being restrained. I never saw her become violent and never saw her under any restraint, and never heard of anything of the kind that my grandmother testified to. At the time Mrs. Shepard visisted my grandmother and was living at the same place my grandmother was.

Mr. Kagey: We object to this as calling for hearsay.

540 The Court: He may answer.

A. I did answer.

Mr. Kagey: Exception.

I remember of my sister taking cocktails both prior to and shortly after she married Major Shepard, and then she took one on occasion during my visit to Prescott, and again in August, there at Omaha on the night we left. Also I faintly recall of her taking one on the boat going to Catalina Island, before prohibition.

A. The times I first knew of her drinking were the times when Dr. and Mrs. Shepard would take me along with them to dinners, and I believe to, as I remember, the old Fred Harlow restaurant in Los Angeles, and those are the main times, because those I remember.

Q. What was the occasion of that drinking?

A. It was just cocktails at dinner.

Everyone else took a cocktail also, I was too young at that time. I never saw my sister under the influence of liquor. I am considerably younger than Zenana, about twelve years. I arrived in Fort Riley on the morning of June 4th.

Q. Now, there has been some talk about a bottle that contained a bichlorid wash, left on the table: I will ask you if that bottle was kept there on the table?

A. Well, I know that it was not kept on the table, and the reason I know, if permissible, is that, at times, when Major Rose was coming—he seemed to be about the most regular of the individuals, he would come along about a given time in the morning, usually sometime after eleven o'clock, sometimes he would come around 12, or possibly a little later, but as a rule he was usually due just about a certain time, and I know of Miss Brown bringing that bottle in and putting it on the stand at those times.

Q. Then what was done with it?

A. I know of one instance when she took it away, otherwise, I would usually have gone down to the hall to have lunch with the Major, otherwise I would have sat out in front, I know of only one instance when I saw her take it out of the room.

When I would come back the bottle would not be on the table. While I was there my sister made objection to the use of the bichlorid wash.

Q. Do you know whether it was refilled?

A. I do not know that.

Q. You paid no attention to it?

A. I paid no attention to that, no.

Mr. Brewster: That is all.

Cross Examination.

I am twenty-seven now and was about thirteen years old at the time my sister was married to the major. It was twenty years ago when my grandmother testified that my

sister became so violent that she had to lock her up. I remember the occasion of my mother being at the hospital.

Q. Yes. You do not remember just what happened
541 just before she went away, do you?

A. It seems to me, when I came there to 2317 West Ninth Street, which was my grandmother's home—

Q. Yes.

A. Well, I tell you, I would rather not say, Mr. Kagey, because I am really confused, on that; there are some things about that time which I could remember, and some things I did not, about that; and really, at that particular time. I am a little confused as to what just transpired in their chronological order.

Q. Was this after your sister had married—What was her first husband's name?

A. Collins.

My sister married Mr. Collins while I was there. I do not remember her ever returning to that house. I remember when our house was built and I remember moving into it. We had been living at another house and not at my grandmother's before we moved into the house that was built. She lived with us when we were living in Avenue 31. We moved from Avenue 31 to our house that was built. I do not remember how long she lived with us there.

Q. You do not remember whether she was living at your grandmother's just before she came to your place?

A. No, sir, I cannot —I have racked my memory on that statement, and I cannot remember.

Curtis McCoskey was recalled as a witness on behalf of the government and testified further in rebuttal as follows:

My grandmother was partially responsible for the house. She made the first payment on it, I believe it was $350, and probably some other payments during the first year. I made the balance of the payments of around $300 a year for approximately 14 years.

Maurine Townsend, called as a witness on behalf of the government, having been first duly sworn testified as follows:

I live at Leavenworth. My husband is a Major in the army, in the Cavalry. At one time we were stationed at Ft. Riley

during the life of Zenana Shepard, and I was acquainted with Zenana Shepard. I became acquainted with her soon after she came to Fort Riley.

Q. There has been some testimony by Major Shepard about his wife coming to the station and missing him. Do you remember any incident of that kind?

A. Yes, sir.

Q. Who was with Mrs. Shepard?

A. I was with her.

Q. Did you and she drive to meet the Doctor?

A. Yes, sir.

Q. What was Mrs. Shepard's condition at that time?

A. Perfectly natural.

Q. What was that?

A. Perfectly normal in every way.

Q. Had she been drinking?

A. No, sir.

542 There was a mix-up in the stations. Those stations are not very far apart; and one could look diagonally across the track and see the other station. The second station, the one that Major Shepard came to, looked more like a sort of a freight station to me. We stopped at the other station. I did not smell any liquor on her breath. When the Major came Mrs. Shepard drove the car back. Major Shepard made no objection to her driving nor did he say anything about her driving in any drunken condition.

Q. Did they converse together on the way back?

A. Yes, sir, a little bit, I believe. As I remember it, I suggested that we all three sit in the front seat, I think, and Major Shepard did not seem to think that was a good idea, and he got in the back seat, so I sat up in the front seat with Mrs. Shepard, as nearly as I can remember.

Mrs. Shepard was a blond, and she was of medium height, I would say, that she was just the right size, I thought, and she had a very good complexion, rather attractive eyes, and immaculate in her dress and very well groomed.

Q. What do you know about Mrs. Shepard's habit in reference to needlework?

A. Well, —

Mr. Class: We object to that question, for the reason it is immaterial, needlework.

The Court: She may answer.

Mr. Class: Save an exception.

She did some needlework; she was doing a hooked rug, I believe, and she was making some clothes, some little things to send to this child in Los Angeles, I believe, it was Curtis' baby, I am not quite certain. There was some fancy work on these little dresses. I have seen Mrs. Shepard take a drink.

Q. Where would this be?

A. Soon after Major Shepard returned from San Antonio I went home with Nana one day and she said Major Shepard had brought her some good liquor from San Antonio, I think, and she thought we could have something to drink.

Q. Go ahead, did you take a drink?

A. Yes, we did.

Q. How?

A. The Major mixed the highball, as I remember.

Q. Who did?

A. Major.

All three of us took a drink. I never did see Zenana
543 Shepard when she was incapacitated from liquor.

Q. Did you ever see Nana Shepard when she was incapacitated from liquor?

A. No, I never did.

Q. Did you know of her being knocked out for 3 or 4 days at a time?

A. No, sir.

Q. For a week or two?

A. No, sir.

I saw Mrs. Shepard on an average of three times a day during Major Shepard's absence. After he returned, I saw her probably on an average of every other day. During Major Shepard's absence she sat at the same table with me at the mess and I also saw her morning, noon and night. She was very healthy, as to her condition at the table, seemed to enjoy her meals and she liked the surroundings very much. I believe I was there when she and the Major first came and I was there all the time the Major was gone, and was present the day the Major returned home.

Q. You were in the station?

A. Yes, sir.

Q. Just tell the jury if there was any evidence in Zenana's appearance on that day that you met the Major different from her appearance when she first came.

A. No, sir, I do not think there was any change in her

appearance at all. She was to me just the same as when I saw her when she first came to Fort Riley.

Q. Did you notice any indication that she was in bad shape thru the long use of liquor?

A. Oh, no, sir.

I remember when she was sick and I went over there off and on, I really cannot say how many times. I went over there the next morning after she took sick. At that time she seemed to be very, very sick. They had called the night before and could not get me and early in the morning then, I went over there and asked, of course, if there was anything I could do. I saw her then and the last time I saw her was 3 or 4 days before her death.

Q. After this first time you saw her, and prior to the time you saw her a few days before her death did you converse with her?

A. Yes, sir.

Q. Did you ever hear her say anything about not wanting to recover and get well?

A. No, sir.

Q. Did she know you?

A. Yes, she knew me.

My husband's name is Major C. A. Townsend and
544 he has been in the army since 1912. We have been married since 1917. We were stationed at Fort Riley a year and we were there when the Shepards arrived. We met the Shepards soon after their arrival and at the same mess with them. I did not call on Mrs. Shepard while the Major was away, I just went over to see her and this averaged about three times a day while the Major was gone. I went with Mrs. Shepard to Junction City to meet the Major when he returned from San Antonio along in December. I do not know what the names of the railroad stations are. One of them is probably the Union Pacific, as it goes thru Fort Riley. The other one where Major Shepard came in was called something about the Katy. We went to the regular station first and then we went to a station that looked like a freight depot and it was a passenger station. I know the firm in Junction City by the name of Davis-Meske; it is a grocery store. They sell crocks and malt. Mrs. Shepard and I bought some down there and made some beer with it in Mrs. Shepard's quarters.

Q. How much did you make?

A. I cannot say as to that exactly.

Q. Did you make a quart, or a pint, or a gallon, or five gallons, or just how much was it?

A. I really cannot say; it was probably more than that. It turned out fairly well. I do not recall how long it was before the Major returned that we made this beer. Mrs. Shepard and I also bought some figs down there and tried to make some wine, but I would not say that it was a success.

Q. Did you hear any conversation between the Major—you say that Mrs. Shepard was never, to use the words of Mr. Brewster, incapacitated from the use of liquor, or knocked out; did you see Mrs. Shepard take any whiskey, other than that in the cocktails, as you testified?

A. I have never seen Mrs. Shepard take more than one drink at a time.

Q. Did you ever see her take any whiskey straight?

A. Yes, I think I have.

As I recall, I saw Mrs. Shepard take a drink of whiskey once. I never smelled the odor of liquor on her breath.

Q. Mrs. Shepard could carry her liquor quite well?

A. I do not know just how to answer that because Mrs. Shepard to my knowledge, I never saw her take more than one drink, so I cannot say. I know Crawford, the colored striker who testified here, but I do not know anything
545 about the whiskey Crawford furnished her. Mrs. Shepard and I did not go *to* together and purchase, thru Crawford, a quart of whiskey at Fort Riley in September, 1928. We did not purchase any whiskey thru Crawford or thru any other colored man or striker or thru anybody. Major Shepard and I managed to get returned the unused articles and supplies to Davis-Meske after the death of Mrs. Shepard.

Gertrude Skow was called as a witness on behalf of the government and testified, in rebuttal, as follows:

I visited Mrs. Shepard while she was sick.

Q. Did you ever have any talk with her in reference to what caused her sickness?

A. Yes, sir.

Mr. Class: We object, may it please the court, the same as interposed to previous testimony along this line, incompetent, irrelevant and immaterial, and hearsay with respect

to any declaration made by Mrs. Shepard in the absence of the defendant.

The Court: Overruled.

Mr. Class: Save an exception.

I had a conversation with her in which the subject of her wanting to find out what was the matter with her was discussed. After the conversation I talked to Major Shepard. I asked him what was the matter with her and he said she was having a nervous breakdown. He also stated that she was going to have to rest for a year and could not play bridge and was going to have to be kept very quiet for a year. That was two or three days after she took sick.

Q. Did she, at any time, express any desire to you, not to live?

A. No, I never heard her say anything about that.

Q. Did you talk with her?

A. Very little, Mr. Brewster.

Constance Crowe Gates, called as a witness on behalf of the government, having been previously sworn, testified in rebuttal, as follows:

I was acquainted with Mrs. Shepard, and testified previously that I saw her the night she took sick. That was about 6:15 in the evening. I visited Mrs. Shepard about every day after she took sick.

Q. Did you ever talk with her or anything, about whether she was getting well or not?

A. Yes, we discussed her coming to San Antonio after I arrived there; I was on my way to San Antonio, we had been transferred to San Antonio, about the time she took sick and we left 10 days before her death. Up to the time we left I visited her every day. I have ridden with Mrs.
546 Shepard in automobiles many times, going to Junction City and Manhattan and around the Post. I do not believe we took any long distance trips.

Q. Did you know anything about Mrs. Shepard doing fancy work?

A. Yes.

Mr. Class: We object to this for the reason it is immaterial.

The Court: She may answer.

Mr. Class: Save an exception.

Mr. Brewster: Did you ever see any of her work?

A. She did beautiful work. She made several luncheon cloths, very fine work.

Q. What was her general appearance?

A. She was a very beautifully dressed woman. She was immaculately gowned.

Cross Examination.

Mrs. Shepard was quite seriously ill when I called on her. She was in bed. At times when I called on her when she was ill, we had more conversation than others.

John C. McDonald, called as a witness on behalf of the Government, having been previously sworn and examined, testified at rebuttal as follows:

I previously testified that while Major Shepard was gone I had occasion to go every day or two into the Shepard Apartments.

Mr. Class: May it please the court, I think this witness testified almost the last witness on the prosecution's side of the case with respect to the matters inquired about now. Your Honor will remember, not only the Captain but Mrs. McDonald was called on this very point.

The Court: I do not know what this is.

Mr. Kagey: They are asking him the same question right now.

Mr. Brewster: It may be, but it is merely preliminary.

Mr. Class: Counsel is forgetful, and I am just trying to remind him.

Mr. Brewster: Much obliged.

The Court: Be careful and not go over it again.

I had occasion to go into Mrs. Shepard's apartment, possibly in the morning, before 9:00 o'clock, and sometimes in the evening. These were not daily, regaular visits, but hardly a day went by when I did not. That was shortly after she came and continued that way until the Major returned. After the Major returned I did not see her as frequently as I saw her while the Major was away. I ate with her in the same mess. I observed her appearance when I saw her the first time and right along, and I observed her appearance at about the time the Major came back.

Q. I will ask you to state whether there was any
547 shocking change in her appearance during that period?

A. No, sir, there was not, Mr. Brewster.

Q. Did you notice any change?

A. No, sir, I did not.

I saw no difference in her health and general condition at the time the Major returned as compared with her condition of health at the time he left. She always seemed to be in good spirits.

The army people are liable to travel together a great deal because the posts are frequently not close to civilian communities. However, that depends upon the family.

Cross Examination.

I used to ask Mrs. Shepard to ride back and forth with me to the *Arnold Hall* mess. On a number of occasions after the thermostat was put in *in* the house, I visited to see if the heat adjustment was satisfactory. I am not sure of the date the thermostat was put in. The apartment was supposed to have been opened on September 1, but was not opened until later in the month. My wife and I called on the Shepards in the evening. I am in the Cavalry and he was in the Medical Corps. Fort Riley is quite a large post and they mingle quite freely. The Shepards and us were not what are called intimates.

Alice McDonald, called as a witness for the Government, having been previously sworn, testified in rebuttal as follows:

I do not remember when the Shepards came to the Post because I was not there at the time. I went home for the summer and it was while there that my husband ate at the mess. I came back to the post around September 10. I noticed Mrs. Shepard's appearance at that time. I saw her more or less frequently up until the Major's return.

Q. I will ask you, what, if any, shocking change you noticed in her appearance between the time the Major left and the Major returned?

A. I did not notice anything.

Q. How did she appear in her personal habits when the Major came back as compared with her personal habits when the Major left?

A. Oh, just the same.

I did not notice any deterioration in Mrs. Shepard's
548 appearance. She had a very beautiful skin, very clear. I never noticed her eyes ever becoming bleary. I never noticed anything that indicated anything to my mind that she was laboring under the influence of any drug or anything. I continued to see Mrs. Shepard after the Major returned and until the time of her illness, and I did not notice any change.

Q. Did you notice anything indicating that she was a user of drugs or liquors?

A. None whateyer. We were living in the same apartment in the same building.

Q. Did that bring you in contact with her, where you would see her?

A. Oh, I would see her in the house every day or else meet in the hall, going in and out, say something to each other, or on the Post; I did not know Mrs. Shepard intimately. I had eyes and could see her. I did not observe any change in her general appearance mentally, or the way she handled herself physically.

I went to call the next day after she took sick. I met the Major and asked him how Mrs. Shepard was. He said she was a very sick woman.

Q. What did he say at that time, if anything, about her getting well?

A. He did not think she would get well. His demeanor at that time was very much concerned.

Q. Was he crying apparently?

A. He certainly was very much up-set, tears in his eyes.

Q. Every time you saw the Major, would he seem to be in tears or sorrow?

A. He really was very much up-set, I would say.

Q. Did you see him cry?

A. I saw the tears come to his eyes when I talked with him.

Cross Examination.

It seemed a very natural thing to do under the circumstances. I left the latter part of June and came back around the 10th of September, 1928. Then I went home again in late November, 1928, and came back in January, 1929. We lived in the same apartment, up stairs, that the Shepards did. I did not see Mrs. Shepard when I went down to call. We

had the same striker; when he came up I would inquire, or he would inquire, or my maid would inquire.

Q. And, you did not pay any attention to Mrs. Shep-
549 ard's physical condition, whether the Major was away or whether the Major was there?

A. One could not help noticing Mrs. Shepard because she was unusual.

Q. You did not keep tab on her?

A. Oh, no.

Q. Or how she looked?

A. I think I would notice any particular change seeing her every day.

Delores Heilman was called as a witness on behalf of the Government having been first duly sworn, testified as follows:

I live at Junction City, Kansas. I was living there at the time Mrs. Shepard took sick. I was acquainted with Mrs. Shepard and I had known her for about four months. My occupation at that time was a maid for Mrs. Skow. Mrs. Shepard, prior to her taking sick, visited in the Skow home and I met her there and came in contact with her. I remember the day she took sick. I think it was on May 20. She called Mrs. Skow along in the morning. I answered the phone.

Q. What was her voice?

A. It was natural.

She made some inquiry with reference to Mrs. Skow, then she and Mrs. Skow talked. That was about 8:00 o'clock of the day she took sick.

Q. Did you notice anything peculiar or strange about her voice?

A. I did not.

She spoke in a natural voice. The next conversation I heard her speak over the phone, she called along about 10:00 or 11:00 o'clock again to see if Mrs. Skow had gotten home. The tone of her voice was at that time, the same.

Q. Did she appear to be in any peculiar condition? Did you notice anything about her voice that attracted your attention?

A. No, I did not.

When Mrs. Skow came home I told her Mrs. Shepard called, so she called. Then the last time I heard her call was along about 5:00 o'clock. She wanted to know if Mrs. Skow had

gotten home. Mrs. Shepard called. At that time her voice was the same, perfectly normal. There was not anything in it that indicated any despondency or trouble of any kind. I never heard her over the phone any more that day.

Paul R. Hawley, called as a witness on behalf of the
550 Government, having been previously sworn and examined, testified as follows:

Q. Major Hawley, did you hear Major Strickler's testimony that at one time, while Mrs. Shepard was ill, and while you were in the room, you told him that you had come to visit Mrs. Shepard at one time, and found her so under the influence of liquor that you could not do anything?

A. I do not think that is exactly what Major Strickler said.

Q. In substance?

A. In substance, yes, I heard the statement.

Q. Did you have that conversation, or anything like that?

A. Yes, the conversation is, in part—I remember—in part, I do not remember—I do remember telling him that I was unable to get a history from Mrs. Shepard at the time I saw her prior to her last illness.

Q. At that time was anything said about her being drunk?

A. At the time—

Q. When you talked to him?

A. I may have told him that there was a history of it. Since she was not drunk at the time, I am quite certain that I could not have said that she was drunk. There was that alcoholic history which—

Q. What kind of a history?

A. The history was given me by Major Shepard; the history was in the discussion; I may have mentioned that during that conversation.

I heard part of the testimony with reference to this mouth wash. I never knew of anybody dying from mercury poisoning from the use of a mouth wash. In case a person dies, and it is from mercury poisoning, two or three grains found in the viscera as testified were found in the viscera of this woman, there would be mercury in other portions of the body. At least half the mercury and probably a little more than half would be found in the viscera as quantitatively examined

by Dr. Muhlberger. It would be in the skin. That is predicated on from length of time between administration and death. I am not able to say definitely in an acute mercuric death, that you would have an appreciable amount of mercury in the bone.

Q. You say the amount of mercury in the viscera, as testified to here as being found in the viscera of this woman, how much of the solution 4,000 to 1,000, would Mrs. Shepard have had to take?

A. A 1,000 to 4,000 solution, four pints would contain 7½ grains of mercury. Between 2 and 3 grains found in the viscera quantitivatively examined, a fair, conservative estimate of the amount found in the whole body would be 3½ grains. 3¾ grains would be half of the total amount of mercury in 1-4000 solution.

Q. That means that she would have to actually drink more than ½ the solution?

A. It means she would have to absorb more than half the solution.

Q. Water abd all?

A. I am not prepared to say. She would have to absorb more than ½ of the mercury in the whole solution.

Q. Is the mercury equally distributed in the solution?

A. Yes.

Q. Would it be possible to absorb the 7½ grains, without taking all the fluid in which it was contained?

A. All of the fluid would have to remain in contact
551 with the mucous surface for a definite and appreciable length of time before it could be absorbed.

It is not good practice to use mercury, of course, where there is danger of its absorption. That is, I am not saying it is used by the most competent physicians. It is still used, for example, for vaginal douches, but there have been very bad accidents following its use. It is not good practice, I believe, to use it where there is danger of absorption. Understand, I am not criticizing the use of it in this case.

Q. I am asking you in the general use, three-fourths of bichloride of mercury in the solution, or half of it, absorbed by the patient, would it be a reasonable use?

A. No.

Q. What?

A. Not in places where half or three-fourths of it would be absorbed.

Q. Is it a fact that that proportion is not absorbed that makes possible the use of this as a mouth wash?

A. The only place where I know that amount could be absorbed where it is in contact with a mucous surface, or a raw surface for a very definite length of time running almost two years.

Q. If there had been only one pint of this solution furnished, and half of that used, would it be possible to have obtained the amount of mercury in the body that was found?

A. No.

Cross Examination

552 The principal effect of mercury on germs is immediate. The longer it stays, of course, or is not combined with the albuminate, which is not particularly bactericidal, that which remains becomes more and more inactive, and, I imagine, it may cover the effect of a few minutes; after that it is practically gone. Certain proportions of the mercury combine with the tissues. There is, of course, an infinitesimal amount of the mercury combined. The principal cause of solution is the action of saliva and secretion to the fluid which comes out of the mouth, so that the solution which comes out, while it contains practically as much mercury as went in, it has had fluids added to it in the mouth, and is, by consequence, a weaker solution when it comes out. I said an infinitesimal amount of mercury stays in the mouth. There are four hundred and eighty grains in an ounce avoirdupois. The mouth is lined with a mucous membrane. It takes time to absorb through the mucous membrane. Where rapid and immediate death is caused from taking mercury into the stomach, the death is not caused from absorption of mercury through the membrane but by shock of the great tissue destruction by contact with the mucous membrane. It combines with the tissues. One does not speak of absorption into the mucous surface, but through the blood stream. Rapid deaths are not due to mercuric intoxication, but to shock from tissue destruction. Where deaths occur in seven or eight hours they could be due to any number of changes. They could be due to acute suppression or to several other things. Mercury does not have to be swallowed to cause death. It could be caused from being rubbed on the body. Anyway it gets in there it is liable to cause death.

Redirect Examination.

You rub metallic mercury, which is not so toxic, and it takes a comparatively large amount. You do not rub bichlorid.

Recross Examination.

It does not have the same effect as bichlorid. You get salivation but it does not have the corrosive action.

Frank J. Hall was called as a witness on behalf
553 of the government and testified in rebuttal as follows:

I was on the stand before and I heard the testimony in reference to the use of a mouth wash. I never heard of a death by mercury poisoning because of a mouth wash. I think it is totally impossible for Mrs. Shepard to have absorbed enough of the mouth wash so that at the time of her death, there would be in her viscera from two-and-one-half to three grains of mercury. That is a very weak solution of mercury, and usually, upon mercury coming in contact with the mucous membrane of the mouth, especially a mouth already in a condition of inflammatory changes, mercury immediately combines in the form of albuminate, the mucous secretions of the mouth, as well as in destroying the tissues already in the mouth, so that the mercury that is there almost immediately is put out of commission while that process is going on. The saliva is pouring out from the salivary glands, and the mucous from the mucous glands, still further destroying the value of the mucous in the saliva as an antiseptic. Peroxid of hydrogen would have no effect on the mercury. It would have a very great effect in the mechanical condition in the mouth. The extra atom of hydrogen in peroxid immediately combats the dead pus condition and foams up and make an abundant foaming, which removes the exudate and leaves the surfaces clean. The condition of the kidneys and the bowels and stomach could not be caused by Vincent's angina. I have read it in the literature but there is no certain proof of that. Spirochetes are certain peculiar types of organic life, in which the germ is wound in a spiral-like thread, resembling the cuttings of a piece of wire in a mill. They resemble tissue fiber. There are a great many species of spirochetes. The presence of spirochetes in the mouth is not necessarily evidence of Vincent's

angina. Everybody has spirochetes in the mouth. There are lots of germs in the intestines. I am certain that intestinal lesion could not be caused by Vincent's angina. I have never seen spirochetes from stomach washings. From the pathological history of this case, and from the examination,
554 I do not think this woman's death could possibly have been caused by Vincent's angina.

Cross Examination.

I have known about three deaths in which the Vincent's picture, that is, the Vincent's spirochete, seemed to be the predominate factor of death. I heard some gossip here about the case at Fort Riley. I have seen cases of that kind. The whole mucous membrane of the mouth and throat was a great necrotic mass, horrible to look at. I have seen it in the lungs. I never saw them in the stomach and intestines. It is possible that they get there. I may have overlooked it in a blue moon. The records show a few cases so ascribed. I never saw this woman's mouth. I do not know whether she had trench mouth, or not.

C. W. Muehlberger was called as a witness on behalf of the government and testified, in rebuttal, as follows:

Q. I will ask you if, in your opinion, it would be possible in the use of a mouth wash, 1-to-4000 solution, properly used, and say even as much as four pints, to absorb enough mercury so that you could have found the amount that you found in the viscera?

Mr. Kagey: Just a moment; I would like to ask a preliminary question: Q. You are not a physician, are you?

A. No, I am a toxicologist.

Q. Yes, sir, and you never have studied medicine, or graduated in medicine, have you?

A. I never graduated in medicine; I studied poisons for a considerable period of time.

Q. You do not claim to be a physician and surgeon, do you?

A. No, not a physician.

Mr. Kagey: We object.

The Court: From your study and experience, are you qualified to answer the question General Brewster asked you, regarding bichlorid of mercury and absorption?

The Witness: I am.

The Court: You may answer the question.

Mr. Kagey: We except.

The Court: Read the question, Mr. Reporter.

(Last question read as above recorded.)

A. I should say, if used as a mouthwash and not held in the mouth for any extended period of time, that this amount would not produce the amount of mercury in the organs which I found on clinical analysis.

I never have known of a death by mercuric poisoning due to bichlorid of mercury mouthwash. In mercury poison all the body has it to some extent. It principally disperses in certain organs although practically all organs will get some mercury. The bones and brain get a very small amount.

Cross Examination.

I do not think it would be good practice to examine
555 the brain if I thought somebody died of mercury poison.

I believe that practically any textbook on toxicology will bear me out in the opinion I gave in answer to the question of General Brewster regarding the absorption of mercury. If it were properly used as a mouthwash, and not held in the mouth for a long period of time and not swallowed, it would not produce death. When mercury is brought in contact with the mucous membrane it probably goes through quite rapidly, within a second or two at least. If the mouthwash is spit out quickly or within a very short time, I mean to infer that the material which is spit out would still contain a large amount of mercury. When bichlorid of mercury is swallowed it attacks the tissues very rapidly. That might be governed somewhat by local conditions, depending on what was in the stomach. If there happens to be a great deal of the white of eggs, probably the action of mercury would be very greatly slowed down, if not stopped altogether.

Redirect Examination.

In order to get the amount of mercury that was found in the viscera, that is, the amount that the mercury I found in the viscera would indicate was in the body of Mrs. Shepard at the time of her death, it would require about one pint of bichlorid of mercury solution in 1-to-4000 solution to get two grains of mercury bichlorid. The mercury from that amount would have to be completely absorbed into the system.

Edward B. Vetter was called as a witness on behalf of the government and testified, in rebuttal, as follows:

I have made more or less of a study of Vincent's angina. My study has not been so much clinical, although somewhat to that extent, somewhat clinical, also my study has been very largely from the laboratory side. I saw the viscera of this woman. I do not know of any evidence in the literature, of any kind or description, that would indicate Vincent's angina could have possibly produced the condition I found. I not only do not know of a death by the use of bichlorid of mercury mouthwash, but I am positive there is not one in the records. It would not be possible from a solution of bichlorid of mercury 1-to-4000 and the entire solution
556 being one pint, to absorb one pint, this being two grains approximately.

Peroxid of hydrogen oxidizes and destroys dead tissue and pus, and all kinds of what we call necrotic and dead tissue. To the extent that mercury had united with the dead tissue, I believe that the effect of the hydrogen peroxid would be to remove that dead tissue, and remove that much mercury from the mouth. It does not remove living tissue, of course, and any mercury combined with the living tissue would still be there. Hydrogen peroxid contains an extra atom of oxygen; it is simply just like water with an extra atom of hydrogen in it, and that is mixed up very rapidly. It would be possible to swallow it, but extremely improbable and difficult. There is always saliva in the mouth. I think it would probably be increased by the introduction of wash into the mouth. I think if spit out it would carry out and dilute the amount or proportion of mercury.

Cross Examination.

Four pints of the mouthwash would contain eight grains of mercury. I think it is extremely improbable that the mouth would absorb through the mucous membrane sufficient of that mercury to leave the deposit of the quantity found in the stomach. There are two reasons which make me think it extremely improbable. In the first place there is not a single case on record of bichlorid poisoning from a mouth wash in some 500-odd cases which are on record; in the second place, because anything of that kind is promptly spit out and does not remain for a long time in contact with the

mucous surfaces, and, therefore, absorption would be very light, and because it seems to be generally recognized among physicians it is not dangerous to use these solutions. Two dentists and one doctor have testified it is a common method of treatment. Taking into consideration that occurrence, in those circumstances, I do not think it would be a common method of treatment. Salvarsan is a common method of treatment for syphilis. Deaths occur from that, generally from improper administration. An improper administration of arsenic could cause death because improperly neutralized.

I do not think anybody is going to hold anything like
557 that in his mouth; it does not taste good. If there were two grains in a pint of wash, then they would have to swallow a whole pint to get two grains.

James E. Ash was called as a witness on behalf of the government and testified, in rebuttal, as follows:

I examined the portions of the viscera that were sent to me. There were no spirochetes. We examined them under a microscope. There was no evidence that the condition that we found was caused by Vincent's angina. I have had a great deal of this pathological work. I have never written any books; I have written some literature. I taught pathology at Harvard. Where a person has taken something and becomes sick, and the physician in attendance suspects they have taken poison liquor, or liquor with some poison in it, the routine treatment is to empty the stomach. The first thing they do in hospitals where they are handling such cases, is to wash out the stomach with a stomach tube; some people use apomorphin first, but there is considerable danger in that. When the stomach tube is used, the contents of the stomach comes through the tube with sometimes a little regurgitation alongside the tube. The contents do not come in contact with the membrane that lines the passages opening from the mouth to the stomach, but is emptied directly out of the stomach into the tube. I do not know of any case where death has occurred from bichlorid poisoning, by the use of bichlorid of mercury as a mouthwash. If peroxid of hydrogen comes in contact with pus in the mouth, there is an immediate liberation of oxygen, and a very great deal of bubbling effervescence or foaming. The formula of peroxid

of hydrogen is H_2O_2 and water is H_2O. The extra atom of oxygen is very loosely combined. It would not be possible to absorb, from four pints, say, of 1-to-4000 solution of bichlorid of mercury, used properly as a mouthwash, the amount of mercury that was found in the viscera of this woman. I have preserved these slides but it is not possible to exhibit them except by microscope, and unless a person knew about those things he could not tell anything about it and it wouldn't be of much interest to him.

Cross Examination.

I am acquainted with Major Callender, and I have
558 a great deal of respect for his ability as a pathologist. I would regard his opinion as a very valuable one.

Redirect Examination.

I heard him say that this woman died of bichlorid of mercury poisoning. I have a respect for his opinion.

Recross Examination.

I did not hear him state his opinion that she might have absorbed through the mucous membranes of the mouth, enough bichlorid of mercury to kill her, using this mouthwash. I do not agree with him on that. I still have a respect for his opinion.

Clara Brown was recalled as a witness on behalf of the government, and testified further as follows:

I have testified before in this case. I had conversation with Mrs. Shepard the second day I was there and her mind was normal; she was rational.

Q. Did she at that time make any statement to you?

Mr. Kagey: Wait a moment; she answered before I could object. I want to object to the question, and move to strike out the answer for the reason that it calls for the opinion and conclusion of the witness, and no proper foundation laid for the hearing of the testimony by this witness.

Mr. Brewster: I will withdraw it then.

Mr. Kagey: And also that it is not rebuttal.

Mr. Brewster: Q. Did you talk with her?

A. Yes.

Q. Did she answer your questions intelligently?

A. She did.

Q. Did she make any statement to you in regard to what she thought about getting well?

A. Yes.

Mr. Kagey: Wait a moment—

Mr. Brewster: Q. What was it?

Mr. Kagey: We object to this as incompetent, irrelevant and immaterial, a conversation occurring in the absence of the defendant, and hearsay; not rebuttal.

The Court: She may answer.

Mr. Kagey: What was the ruling?

The Court: She may answer.

Mr. Kagey: Exception.

Mr. Brewster: What was it? What did she say? Read the question.

(Last question read as above recorded.)

A. She said she was not going to get well.

Q. Did she make any statement as to what was going to happen to her?

A. She was going to die.

Mr. Kagey: Wait a moment; we make the same objection to that question, and move to strike out the answer, for the reason that it is hearsay, not made in the presence of the defendant, incompetent, irrelevant and immaterial, and not rebuttal.

The Court: Overruled.

559 Mr. Kagey: Exception.

Mr. Brewster: Q. Did she, at that time, or at any time, or at any time after that, ever express in your presence any idea that she was going to get well?

A. No.

Q. Did she afterward, and at different times, make any statement to you as to whether she would, or would not get well?

A. Yes.

Q. What did she tell you?

A. She—

Mr. Kagey: We object to that, for the reason that it is hearsay, incompetent, irrelevant and immaterial, not shown to have been made in the presence of the defendant, not rebuttal.

The Court: She may answer.

Mr. Brewster: A. At the time—

The Court: Just a moment; let her answer.

Mr. Brewster: Oh, pardon me. Read the question.

(Last question read as above recorded.)

A. She said she was going to die.

Q. At the time she told you, on the second day that you were there, that she was going to die, did you, at that time and in that connection, have a conversation with her in reference to her condition?

A. Yes.

Q. What was it?

Mr. Kagey: We object to that as hearsay, not made in the presence of defendant, incompetent, irrelevant and immaterial.

The Court: You may answer.

Mr. Kagey: We except.

The Court: Read the question, Mr. Reporter.

(Last question read as above recorded.)

A. She asked me if I would do her a favor. I consented. Then she told me to go to Major Shepard's room and, in his closet, get a quart whiskey bottle off the shelf.

Mr. Kagey: What kind of a whiskey bottle?

The Witness: It was a quart.

Mr. Kagey: A quart?

The Witness: Yes. It was a dark green whiskey bottle, with a whiskey label, which she said was the one—

Mr. Brewster: Did you make more than one trip before you brought the bottle?

A. I did.

Q. Go ahead and state what she said to you.

A. She asked me to smell the contents. I did so. She then asked me if it smelled peculiar. I told her I did not know. She asked how much was in the bottle. I noticed there was not more than a tablespoonful; there was not more than a tablespoonful; and told her.

Q. Speak a little louder.

A. She said she knew there could not be but a small amount, because the last time she had taken a drink out of that bottle, she made a remark to Major Shepard, that there was not only enough for about one more drink, and she was going to save that until she needed it. She asked if that was enough to test for poison. I told her I did not know.

Q. What did she say with reference to that liquor, when she and the Major had it, whether it was good or bad whiskey?

A. It was good.

Mr. Kagey: Just a moment. We move to strike out the answer, and object to the question, for the reason that it is incompetent, irrelevant and immaterial, hearsay called for from this witness, and is not rebuttal.

The Court: Please read the question, Mr. Reporter.

(Last question read as above recorded.)

The Court: You may answer.

Mr. Kagey: Except.

A. It was good.

Mr. Brewster: Now, go ahead and state what, if anything, she said as to how she took sick, and what she did.

Mr. Kagey: We object to this as incompetent, irrelevant and immaterial, hearsay, not rebuttal testimony, incompetent, irrelevant and immaterial.

The Court: She may answer.

560 Mr. Kagey: Except.

A. She stated that this was the bottle from which she drank just before collapsing on the evening of May 20.

Mr. Brewster: Q. What did she say as to the taste of it the night she took sick, the 20th?

Mr. Kagey: Object to this as leading.

Mr. Brewster: What, if anything?

Mr. Kagey: Objected to for the further reason that it is hearsay, not rebuttal, a conversation not shown to have been made in the presence of the defendant.

The Court: You may answer.

Mr. Kagey: Except.

A. It was altogether different.

Mr. Brewster: What did she say? Give her words.

A. It was not good.

Q. Did she say anything about how it tasted?

Mr. Kagey: Same objection.

The Court: You may answer.

Mr. Kagey: Except.

A. She said that she was being poisoned.

Mr. Brewster: What did she say? Give her words.

Mr. Kagey: All right; we object to this, also, as incompetent, irrelevant and immaterial, hearsay, not made in the presence of the defendant, not rebuttal.

The Court: You may answer.

Mr. Kagey: Except.

A. She said; "Dr. Shepard has poisoned me."

Mr. Brewster: Q. Now, did she, on any other occasions, make any statement to you about what would happen to her?

A. Yes.

Mr. Kagey: Now, just a moment—

The Court: Just a moment—

Mr. Kagey: That is all right; you may answer that question, because it does not call for the conversation.

The Court: Just read the question, Mr. Reporter.

(Last question read as above recorded.)

The Court: She answered "Yes"; she just answered "Yes."

The Witness: Yes.

Recross Examination.

The bottle was labeled whiskey. That is all I remember. I do not know if it was what is known as a Scotch bottle. It was a green bottle, round and tall, about eleven inches tall, quart size. I am just guessing it was a quart bottle. It was a dark bottle. I could not see the color of the liquor. It had not more than half a tablespoonful in it; not over half an ounce. I got it on a shelf in Major Shepard's room. There were other bottles there, some fancy bottles, I would call them wicker covers, like a jar. They did not have any labels on them, that is all I noticed on the shelf. It was on the side of the room in the Major's bedroom behind the door. It was more or less dark in there unless the door was pushed around. There was a door leading to the porch and there was only one window. The closet had one shelf and that shelf was up high enough for all the clothes to be hung up. I had to reach up pretty high. That is
561 the only bottle that had any liquor so far as I know.

I did not tell anyone about it. The first time I told anyone about was after her death. I put the bottle back on the shelf just as I had found it. I never showed it to any one. I never mentioned it to Doctor Hawley or to Sergeant Gresser. There were six or seven doctors on the case while I was there. I never showed the bottle to any of the doctors. I did not feel that it was any of my business.

Q. Do you mean to say that you were on that case for twenty-five days, after you had been told by Mrs. Shepard that she was poisoned, and her husband had poisoned her, and poisoned her with this specific liquor, and never said a word to a soul about it?

A. Yes, because she took me into her confidence.

Q. Do you think that that excused you? That is your excuse?

A. Yes, because I promised her I would not tell.

Q. You promised her you would not tell?

A. Yes.

Q. You thought she knew what she was doing when she told you that?

A. Yes, I think she was.

Q. You never told a soul about it?

A. No.

Q. When did you first tell any of the government detectives here?

A. Not until they came to see me.

Q. Not until they came to see you. When was that?

A. That was, I think, in December, I am not sure, but I think it was in December.

Redirect Examination.

I started to tell Miss Montgomery about it but she would not listen to me. She just walked away. I told her Mrs. Shepard thought she was being poisoned.

Q. Did she say anything?

Mr. Kagey: Wait a moment; wait a moment; we move to strike that out. This certainly is not competent. We ask that the jury be instructed to disregard any conversation occurring between her and Miss Montgomery.

The Court: I think that was brought out by you.

Mr. Kagey: I did not ask her for any conversation.

The Court: You asked her if she had told anybody.

Mr. Kagey: I asked her if she had told anybody, and now she proposes to relate the conversation. Had I called for that conversation, it would be competent.

The Court: I will let it stand.

Mr. Kagey: Note an exception. Is that all Mr. Brewster?

Mr. Brewster: Yes.

Recross Examination.

I had a conversation with Miss Montgomery just before dinner one evening. It was in June. It was the first of the month. I do not know just the week.

Redirect Examination.

I testified before the Grand Jury in April, 1930. Prior to that I talked to Mr. Glass, the government agent about November, 1929.

Charles A. Shepard, the defendant herein, called as
562 a witness on his own behalf having been previously sworn and examined, testified in surrebuttal as follows:

I heard the testimony of Nurse Brown who just left the witness stand, and I heard her testify about there being a bottle that she designated as a quart bottle containing some liquor on the shelf in the top of my closet. On the shelf at the top of my closet I keep odds and ends, clothes and things, I was not using; old clothes I had discarded. I did not ever keep a bottle of liquor there. I did not ever know of this bottle of liquor being there. I did not ever remove it from there. I did not hear of it being there until she testified here on the witness stand.

Q. One other question: Did you know of any liquor bottle being there?

A. I never saw any liquor bottle, never had any.

When I used this closet I did not have any occasion to use the shelf or pay any attention to the shelf. I did not remove the things from that closet myself; they were removed when I was away.

Cross Examination.

There was a closet in my room; there were shelves in all the closets.

Q. I mean in this closet in your room; and you say you never saw any liquor in that closet?

A. I did not say anything of that kind.

Q. What did you say?

A. I said I never saw the bottle that was described by Miss Brown.

Q. Did you say you did not see any bottles there?

A. I do not recall.

Q. You made the statement, did you not, in response to questions asked you by Mr. Caffrey? You said, and you were asked by Agent Caffrey "was there any liquor in the house on any dates prior to May 20, 1929?" to which you answered, "Yes, I sent and got some wine; she had been drinking this

bootleg stuff and she had been so sick at different times, vomiting, and she promised me if I would take a drink with her when she took one, that she would only take one when I did, and I thought if we could get some wine it would stop this other."

Q. Do you remember where this liquor was kept in your quarters; was it kept in Mrs. Shepard's room or your room?

A. There was some in my room on a shelf; and then there was some in the basement, we had the wine in a keg and drew off what we wanted in bottles, and she made beer herself, and she handled it. I did not drink beer.

563 Then you were asked: "Do you know whether or not there was any whiskey in your room about May 20, 1929?" and you answered: "I do not know just that time, there had been whiskey on the shelf."

Q. Can you describe the bottles that this liquor was kept in on the shelf in your quarters at Ft. Riley?" and you said, "No, sir."

Q. Do you remember testifying to that?

A. Yes.

Q. Is that correct?

A. You asked me about this certain bottle.

Q. No, I did not ask you about that.

A. Absolutely you did.

Q. All right, you made those statements, did you not?

A. Yes, I did.

Mr. Brewster: That is all.

Mr. Kagey: Q. Those statements are true, are they not?

A. Those statements are true to the best of my knowledge and belief.

564 Walter A. Rose was called as a witness on behalf of the defendant, and testified, in surrebuttal, as follows:

I was in the courtroom when Nurse Brown testified in rebuttal about having given the bichlorid of mercury solution to Mrs. Shepard. I did not hear her testify that there was only a half a bottle of the mouthwash used, and that she never gave Mrs. Shepard any of it after the first day. I had conversations with Mrs. Shepard at the times I was treating her for this mouth infection and she told me from time to time on several occasions that she was using it regularly.

Nurse Brown never, after the one time when she said Mrs. Shepard did not like the taste of it, said that she was not following my directions. I personally administered the mouth wash. I could not say exactly how many times I administered it, sometimes once a day, sometimes twice a day over a period of two weeks. At a visit I would administer approximately from one to two ounces. I think I visited Mrs. Shepard twenty or twenty-one times. The bottle was a pint bottle. I myself administered more than a pint of the solution to Mrs. Shepard. I testified before, if I remember right, that four or five bottles of the solution were used. I did not hear the testimony of Nurse Brown about there being a bottle in the closet of Major Shepard's room, which she found, and which contained some liquor. I helped to pack Major Shepard's things at the time he was taken sick. Captain Holycross and I packed his effects. I found a quart bottle containing some liquor on the shelf in the closet of Major Shepard's room. Captain Holycross was in the house with me. That is the only bottle found there that contained any liquor that I saw. After I found it, I took it out in the kichen where Capain Holycross was. I would estimate that there was one and a-half or possibly two ounces in the bottle. There was more than a tablespoonful. I opened it. Captain Holycross was there after I opened it. I drank it. I tasted it and smelled it and asked Captain Holycross if he would have a little drink with me, and he said, no, he didn't care for any. I poured it out in a glass and drank it. I could not say just what kind of liquor it was. I would call it Kansas corn. After drinking it I did not experience
565 any inconvenience, or symptoms of any sort.

Cross Examination.

This was the same day that Major Shepard was sent to Fitzsimons Hospital; he was seriously ill at the post. It was approximately a quart bottle. I do not know whether it was a full quart or a short quart. I just remember the size of it. I do not know what color it was. I do not remember. It was the latter part of July. Mrs. Shepard had died and been buried, the Major had taken her body to California, and he had been sick in the hospital.

Redirect Examination.

Major Shepard's clothes and effects and everything were still in his apartment at that time, except he had on his

uniform; they had to take him to the hospital and he had on his uniform, and a few toilet articles; outside of that, all the rest of his things were in his quarters.

Recross Examination.

I administered about twenty-one ounces of this medicine. I did not think there was any danger of killing her by doing it. I did not expect it to kill her. I did not know that she was absorbing enough mercury to cause her death. I did not think so. If I had had any suspicion that it was going to kill her, I would not have prescribed it.

F. L. Holycross was called as a witness on behalf of the defendant, and testified, in surrebuttal, as follows:

I remember that Major Shepard became very sick and had to be taken to the hospital and sent to Denver. We took him to the hospital seriously ill. None of his clothing or effects were removed from his apartment before he went to the hospital. He was taken from the hospital to Denver and never returned to his apartment. While Major Shepard was being prepared to be sent to Denver, Major Rose and I went to his apartment to get his bag, trunk and hand-bag. We went out to his house that afternoon about three o'clock; went to his quarters and packed the things we thought he would need and that he had suggested he might need. I looked into the closet behind the door in Major Shepard's room. Most of the clothing and possessions that we packed in the trunk were in this closet. We did not find anything on the top shelf other than odds and ends. We found
566 a gallon bottle half full of liquor and a quart bottle with some liquor in it. I believe the gallon bottle was on the floor in his closet. I would not say where the quart bottle was. Major Rose was helping me and he had gone into the kitchen, and later called me to come in and have a drink with him, he had some good liquor. It was in a quart bottle and also the gallon jug. I noticed that Major Rose was holding the quart bottle. There did not seem to be much in it. I think there was two ounces. I saw Major Rose take the cork out of the bottle then he got a water glass and poured it out into the glass. He took a drink. I told him I did not want any liquor. He drank the liquid out of this bottle. That is the only quart bottle we found

containing liquid when cleaning out Major Shepard's room. There were many odds and ends of bottles lying around in the doctor's place that we packed up later. We were in the house for the primary purpose of packing up clothes. I did not sample the liquor and I did not smell it. I did not notice the color. I think it was a quart bottle.

Cross Examination.

There were bottles of beer in the ice box. That was a month after Mrs. Shepard's death. It was an electric ice box. His house boy claimed the beer. We went there the following day after we packed his clothing and the Major had gone away. He asked us to clear up everything that was there, in case the commanding officer looked in for liquor, there would be no evidence. There was none on the shelf at that time that I recall. Th commanding officer makes an annual inspection. Major Shepard's wife had died on June 15th. He had taken the body to California. He had returned to Fort Riley then had gone to either Denver or San Antonio. I would say this inspection was made the latter part of July. He had left the keys with me. I believe he left the house instantly the day he took the body away; I would not say for sure. Major Rose helped me. We found a bottle. I could not say if it was on the shelf. I was being assisted in the work. Major Rose called my attention to the bottle. I did not see where he found it.

Edward J. Strickler was called as a witness on be-
567 half of the defendant and testified further, in sur-rebuttal, as follows:

I visited with Mrs. Shepard the day after she had the attack, the next day after she had the attack and talked with her. I have made a specialty of insanity and the different forms of insanity. I have a judgment based upon my training and experience as to whether on that day Mrs. Shepard was coherent. She was not.

Q. Have you a judgment as to whether she would be responsible for any statements she made on that day?

Mr. Brewster: We object to this as incompetent and immaterial, and not a matter of expert testimony, and not directed to the time when she talked with the nurse.

Mr. Kagey: What day do you claim the nurse talked to her?

Mr. Brewster: The second day.

Mr. Kagey: The second day. All right.

Q. Now, Major Strickler, did you see her on the second day after she had this attack?

A. I did.

Q. Did you talk with her, and were you with her, treating her, at that time?

A. I was.

Q. From your experience as a psychiatrist, have you a judgment as to whether or not she was coherent on that day?

A. She was not.

Q. Would she, in the condition she was in, have been responsible for any statements she made of any kind?

A. I do not think so.

Q. —At any time?

Mr. Brewster: Just a moment; we object to that as not proper expert testimony as to whether she would be responsible.

Mr. Kagey: I withdraw that question. I will ask another question. Was she sane on that day?

A. She was not.

Cross Examination.

I did not see her all day. I saw her the first time, the night she was taken sick. I saw her the next day. I do not know just exactly what time it was. I saw her the second day after. I do not know just exactly what time it was. Major Hawley had been called in the next day after she was taken ill, as I remember it. I did not hear his testimony. I have not heard any testimony.

Redirect Examination.

The best I can remember, I called to see her up until she had been sick about two weeks. She was not coherent during the first week that I treated her.

C. W. Muehlberger, a witness on behalf of the government was recalled for further recross examination by the defendant, and testified as follows:

The total quantity of mercury which I found, as a result of my analysis, in the viscera which I analyzed, was between

six and seven milligrams. From that I estimated that there were between two and three grains in the stomach,
568 liver and kidneys. I made that quantitative estimate regardless of the quantity that I had to analyze.

The defendant here presented its motion for a directed verdict.

The Court: Let the record show the motion for a directed verdict considered by the court, overruled, and defendant allowed his exceptions.

After the Court had instructed the jury, the following took place:

The Court: I will hear any suggestions or exceptions you have now.

Mr. Kagey: I will say that the defendant is entirely satisfied with the instructions.

The Court: Has the government any suggestions? I guess not.

(Jury retired.)

Certificate of Settlement of Bill of Exceptions.

On this 19th day of January, 1932, and within the
569 time allowed by the United States District Court, the appellant, defendant below, duly tendered this, his bill of exceptions herein, which having been seen and examined by the court and counsel is by the court allowed and approved, and said bill of exceptions is correct in all respects, and is hereby settled and made a part of the record herein.

Given under the hand of the judge of said court before whom said proceedings were had, this 19th day of January, 1932.

RICHARD J. HOPKINS,
Judge who presided at said trial.

The above and foregoing bill of exceptions is hereby approved.

C. L. KAGEY,
Attorney for appellant.
L. E. WYMAN,
Attorney for appellee.

Let the bill be filed and the filing shown of record as of this 19th day of January, 1932.

RICHARD J. HOPKINS,
District Judge.

Filed in the District Court on January 19, 1932.

Court's Instructions to Jury.

Gentlemen of the jury: The court wishes to thank
570 you for the splendid attention you have given to all of the proceedings in this case. I feel sure you have listened with care to the testimony of the witnesses and the arguments of counsel. You of course understand that your body and this court are merely instrumentalities created by law for the purpose of working out and administering justice.

We are here to investigate the truth and should do it just as in any ordinary cause without regard to the consequences. We are here to perform solemn duties, important to the government and to the defendant. All we can expect to do is to bring the case to a just decision. The defendant is charged with a high criminal offense, one of the highest known to the law. We live under a government of laws. The constitution has entrusted to another department of the government the power of making these laws. We are not responsible for existing laws, and whatever our views may be upon the subject of the particular punishment which the law has appropriated to a particular offense, is not our concern. Our duty is to put the laws into execution, to administer them truly and fairly. When any person is brought before the court in the manner required by law, the court must consider what the law and the evidence is and whether or not the defendant has violated it in such a way as to be amenable to public justice.

The court and the jury each have their particular duties to perform. Each is responsible for the performance of the duty assigned to him. It is the duty of the jury to take the evidence into consideration, to apply their best judgment and their best efforts to ascertain the truth, and then to declare that truth in what is called a verdict. Therein lies the declaration of that truth. This is your province, and if the court and the jury each properly carries on and keeps within its

own province, the law will be administered. All will be done which should be done for the punishment of the guilty and the relief of the innocent.

In trials of murder in the first degree, the instruc-
571 tions are necessarily long because of the importance and gravity of such cases. Bearing this in mind I will make the charge as short and as concise as possible, and trust you will give it your careful consideration. The duty resting upon you is an important one, and I feel you will perform it with a full sense of your responsibility. It is the duty of the court to charge you as to the law which shall govern you in your deliberations, and it is your duty to take and follow the law precisely as declared by the court.

In deciding questions of fact, you will be guided by the law and the evidence alone; by the evidence given during the trial, and not from any supposed knowledge of the facts or occurrences derived from any source other than that given before you in open court and the law stated to you by the court must be your only guide. The court and the court alone is responsible for any mistake that may be made in the matter of law. If any mistake is made by the jury in administering justice, that is, in finding the facts, that is a mistake for which the jury alone is responsible.

It is your duty to see that the law is upheld and that if the crime charged against the defendant is proven beyond a reasonable doubt, your verdict should be returned accordingly. On the other hand, the rights of the defendant should be protected, and he should be given the benefit of every reasonable doubt, and the presumption of innocence which the law has wisely and justly thrown around him.

The indictment in this case charges that the defendant, Charles A. Shepard, on June 15, 1929, at and upon the United States Military Reservation at Ft. Riley, Geary County, Kansas, upon land reserved and acquired for the exclusive use of the United States of America, and under the exclusive jurisdiction of the United States of America, in the first division of the district of Kansas and within the jurisdiction of this court, did then and there knowingly, wilfully, unlawfully, purposely, feloniously, deliberately, premeditatedly and of his malice aforethought and with intent so to do, kill and murder Zenana Shepard, a human being, said murder

being perpetrated by giving and administering to her certain drugs and poisons, to-wit, bichloride of mercury, com-
572 monly known as corrosive sublimate and other poisons with the unlawful, felonious and premeditated intent to take her life and that she, Zenana Shepard, from the effects of said poison did languish and languishing did then and there died on June 15, 1929. That this the said Charles A. Shepard did contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Now, the finding of this indictment by the grand jury is no evidence of the guilt of the defendant. It is a legal charge against him of having committed that crime. To that charge he has pleaded not guilty, and that created the issue which you are called here to determine. That indictment is based upon the Act of Congress which provides that crimes and offenses defined in the chapter pertaining thereto shall be punished as therein prescribed. When committed within or on any land reserved or acquired for the exclusive use of the United States and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the state in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard or other needful building, they come within the jurisdiction of the United States. If thus committed in those places, they are subject to indictment and prosecution in the courts of the United States. And you are instructed that under the acts of Congress and under the acts of the state legislature the United States Military Reservation at Ft. Riley, Kansas, is a place exclusively within the jurisdiction of the United States, and that the crime of murder or any other crime committed on that reservation is subject to prosecution only in the courts of the United States.

This statute further provides that: "Murder is the unlawful killing of a human being with malice aforethought, and every wilful, deliberate, malicious and premeditated killing is murder in the first degree." So that in the definition of murder as declared by the act of Congress, we come to this: that a deliberate, premeditated, wilful murder, with
573 malice aforethought, is murder in the first degree.

Every person guilty of murder in the first degree

shall suffer death, except that in all cases where the accused is found guilty of the crime of murder in the first degree, the jury may qualify their verdict by adding thereto, "without capital punishment", and wherever the jury shall return a verdict qualified as aforesaid, "without capital punishment", the person convicted shall be sentenced to imprisonment for life.

In your deliberations in the jury room you must not allow passion, prejudice or partiality to influence you in the slightest degree in deciding upon your verdict, but you must be guided by the law as given to you by the court and the evidence of witnesses given in your presence.

The law presumes the defendant to be innocent of the charge made against him and this presumption of innocence continues to operate in his favor throughout the trial and until the contrary is proven by the evidence and until each and every ingredient necessary to constitute the offense charged against him is proven by the evidence beyond a reasonable doubt.

You are instructed that there are two kinds of evidence: direct and circumstantial. Direct evidence is when a witness testifies directly of his own knowledge of the main fact or facts to be proven. Circumstantial evidence consists of proof of certain facts and circumstances from which the jury may infer other and connected facts which usually and reasonably follow, according to the common experience of mankind.

Circumstantial evidence is legal evidence. In connection with the positive evidence in this case there are circumstances which you may consider.

There is this distinction between direct and circumstantial evidence; direct or positive evidence arises where a witness may be called to prove the precise fact which is the subject of inquiry. That is, did one person cause the death of another? That is the fact to be proved. Can it not be proved?

Circumstantial evidence may be of such nature as to
574 warrant a conclusive belief that someone did it; and it would be injurious to the best interests of society if circumstantial proof could not be considered. If it were necessary always to have positive evidence, many crimes committed which destroy the peace and security of society

would go entirely unpunished. There may be circumstantial evidence quite as strong, indeed sometimes considered stronger, than positive evidence. The attempt to compare one of these means of proof with the other is not based upon sound elements of comparison, because there is no common medium by which they can be compared. Each has its own advantages and disadvantages, and it is necessary to understand them both.

The necessity, therefore, of resorting to circumstantial evidence, is obvious because crimes in many instances, are secret. Most crimes seek the security of secrecy. It is, therefore, necessary to use another mode of evidence than that which is direct, provided there is another mode: there is furnished a means of proof, in another way, quite as strong and satisfactory as that arising from the direct testimony of a witness. The advantage of positive testimony is, that you have a person who, if he is to be believed, saw the act done; and the only question is whether he is to be believed. You have the satisfactory evidence of that witness; and from the circumstances and peculiarities in which he is placed he may be entitled to belief. The advantage is that you have one who testifies to the fact itself.

But in the case of circumstantial evidence, no person having witnessed the fact or the act, you arrive at it by a series of other facts which, by long experience, we have so associated with the fact in question that they lead to a conclusion as direct, as positive, as satisfactory as if it was derived from positive proof itself. Circumstantial evidence is founded on experience and obvious facts and coincidences establishing a connection between the known and proved facts and the facts sought to be proved.

It must be a fair and natural inference, not a forced or an artificial one. Each fact which is necessary to the conclusion must be distinctly proved. It is not therefore, that partial proof of a variety of facts be proven and then draw an inference from them. Each fact necessary to the conclusion must be proved.

575

It does sometimes happen, that facts are offered in evidence, not because they are necessary to the conclusion, but to show that they are consistent with it, and not repugnant to it.

If the proof of one of these facts fails, it does not destroy the chain of facts; it fails only to give them that particular corroboration.

There is another class of circumstances, which may be considered, arising out of the conduct of men in certain situations; because from long experience, it is known that men act from motives; and that men in certain circumstances are likely to act in a particular way. Indeed this is the only mode in which a great variety of crimes can be proved, because there are many crimes which can be proved only from the intent. Now, the intent is a secret of the heart, which can be known only from his declaration, and those he may never disclose to any person.

But is it reasoned from the fact that a man, doing a certain thing, acts in a particular way, and is always presumed to intend the natural and usual consequences of his own acts.

The natural conduct of man is such that fair inferences can be drawn from it. It is necessary to the proper administration of justice that circumstantial evidence shall be considered because it is in its nature satisfactory, and if proved, it is equally conclusive.

Sometimes inferences coming from independent sources, different from each other, and tending to the same conclusion, not only support each other, but support each other with an increased weight of evidence.

But where the circumstances are proved, where they lead to a certain result, it may not be the same species of evidence, but it is legal competent evidence, and evidence which is necessary in many cases in order that the guilty may not escape, but they must be of a conclusive tendency. Yet, how is that conclusive tendency to be shown? Whether the
576 party had or had not the motive to do the act may be shown; that is that there was an advantage or an end to be gained by doing it. The facts should be, to a moral certainty, exclusive of any other reasonable hypothesis. They must be such not only as are consistent with the guilt of the party, but they must exclude and overthrow every other reasonable hypothesis.

You are the exclusive judges of the weight of the evidence, of its credit and value. You are likewise the exclusive judges

of the credibility of the witnesses, including the defendant, and it is for you to determine the force and effect to be given to the testimony of each of them. In determining this question you may take into consideration the bias and prejudice or unfairness that may be manifested by any witness in giving his testimony; also the interest that any witness may appear to have in this action, as well as the means and opportunity of the witnesses of knowing the matters about which they may have testified.

You are not authorized by law to arbitrarily reject without cause or reason the testimony of any witness, but it is your duty to carefully examine all the evidence in the case, and if it is possible to harmonize it upon a basis of truth, it is your duty to do so, but if you are unable to do that, then you are authorized and it is your duty to reject such of it as you think not entitled to credit.

If you believe from the evidence that any witness has knowingly and wilfully testified falsely as to any material fact in the case, you may wholly disregard such testimony of the witness, but you are not bound to do so. You may still give such testimony of such witness such weight as you may think it is entitled to receive.

There has been testimony in this case known as "expert" testimony; that is, the testimony of medical men who have testified from a professional standpoint. The testimony of experts is to be considered like any other testimony; it is to be tried by the same tests and to receive as much weight and credit as the jury may deem it entitled to when viewed in connection with all of the other circumstances, and its weight and value are questions for the jury.

The burden of proof rests upon the government to
577 prove to your satisfaction beyond a reasonable doubt each and every ingredient of the offense charged in the indictment, and this burden of proof does not shift from the government to the defendant at all, in any phase of the case. The burden of proof rests upon the government to prove his guilt and not upon the defendant to prove his innocence.

By the term "reasonable doubt" I do not mean a possible doubt, a mere speculation or a captious quibble suggested for

the purpose of evading the performance of an honest duty, but I mean such a fair and reasonable uncertainty concerning the truth or falsity of any matter or thing as would naturally and honestly be suggested to the mind of a candid and conscientious man, after careful and impartial consideration of such matter, if submitted to him for consideration and decision. Or, expressed in other language, a reasonable doubt is that state of the case which after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they can not say they have an abiding conviction to a moral certainty of the truth of the charge. That is to a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it.

However, the government is not called upon to make a case free from any possible doubt, by proving the defendant's guilt to an unassailable demonstration. Such proof is rarely obtainable in dealings with human transactions. There is hardly anything relating to human affairs that is not open to some possible or fanciful or imaginary doubt.

As before stated the natural and probable consequences of every act deliberately done by a person of sound mind are presumed to have been intended by the author of such act, but this presumption is subject to being disproved by the testimony in the case, and you must determine from all of the facts and circumstances proven in the case whether any such intent existed at the time.

The rule of law which throws around the defendant the presumption of innocence and requires the government to establish beyond a reasonable doubt every material fact averred in the indictment is not intended to shield those who
578 are actually guilty from just and merited punishment, but is a humane provision of the law which is intended for the protection of the innocent and to guard against the conviction of those unjustly accused of crime.

"Premeditatedly" as used in the statutes and in the indictment means that particular crime charged against the defendant was thought of by him beforehand, before he administered the fatal poison, if he did administer it.

"Deliberately" means weighing in the mind, to consider

and examine the risks for and against a measure or an action in order to form an opinion thereon.

The word "premeditated" means to think or revolve in the mind before hand and to contrive and to design purposely. To constitute premeditation and deliberation however, it is not necessary that they precede the killing at any great length of time, but it is sufficient if they actually existed before the killing, however short the time of their existence may have been.

"Wilfully" means intentionally, purposely, and not accidentally.

The word "malice" as used in this statute and in this indictment as constituting an element of a murder means that condition of the mind which prompts one to take away the life of a fellow creature without just cause or excuse, and it signifies a heart regardless of social duty and fatally bent on mischief. "Malice aforethought" means that the act was done with malice and premeditation.

Now, it is within the court's province to comment on the evidence, but whatever comments I make are in no way binding on you in your deliberations because, as I have heretofore stated, you are the exclusive judges of the credibility of the witnesses and the weight to be given to their testimony and whatever comments I make are made for whatever help they may be to you in deciding the issues in this case.

Considerable of the evidence is uncontradicted. It appears that the defendant and the deceased, Zenana Shepard, were married in Los Angeles, California, sometime in 1916. The defendant is a physician and has been practicing his profession since 1896. During some of that time he has operated a private sanitorium. It appears from the evidence that
579 the deceased, Zenana Shepard, was a nurse in one of these institutions at the time of the defendant's marriage to her in 1916. Sometime after their marriage the defendant became a member of the regular Army, his branch being the medical corps. From that time on until the date this murder is alleged to have been committed he remained in the medical corps of the United States Army, and the deceased remained as his wife. During this time he has been in the Army, he has been stationed at various military posts throughout the United States and the Phillippine Islands.

The testimony shows that the defendant and his wife came to Fort Omaha, Nebraska, in the year of 1924, and in the latter part of August, 1928, the defendant was ordered to report to Fort Riley, Kansas, another military post, which is within the exclusive jurisdiction of the United States of America. About the same time the defendant was transferred to Fort Riley, he was also ordered to report to Brooks Field, Texas, to take a special course in flight surgery. This course began on September 1, 1928, and lasted for three months, and along about December 6 or 7, the defendant returned to Fort Riley, Kansas, to report for duty where he had heretofore been assigned.

The defendant and the deceased while living at Fort Riley resided in an apartment building, located on the United States military reservation at Fort Riley.

The testimony shows that sometime on the evening of May 20, 1929, the deceased became seriously ill, was confined to her quarters and bed for some 25 days, when she died on June 15, 1929. The testimony shows that after her death an autopsy was performed inquiring into the cause of her death and at this autopsy the stomach, part of the liver, large and small intestine, the spleen, appendex, one kidney and pole of another, and pancreas, were removed and examination was made by various physicians, pathologists and toxicologists of the viscera. The pathologists reported the findings of certain ulcers in the stomach, a large number of ulcers in the large intentines, certain conditions of the kidney and liver, and the rest of the viscera, which you heard in the testimony. The toxicologists made an examination and analysis
and I believe what was known as a qualitative analysis
580 of part of the viscera was made by Colonel E. B. Vetter of Washington, D. C., and a quantative analysis was made by *Mrs.* C. W. Muehlberger, a toxicologist of Chicago. Both found mercury in this viscera. Now, the evidence shows Colonel Vedder estimated there were two or three *gains* of mercury in the viscera. Mr. Muehlberger in his quantative analysis made findings and, taking the amount he found in the parts that he analyzed, stated that in the whole of the viscera, using what he had for a basis, there was from two and a half to three grains of mercury. Now these facts, gentlemen, it seems to me, are rather clearly established, but, as heretofore stated, you are the judges

of the weight of the evidence. There then arises these two questions:

Did this woman die of mercurial poisoning, and secondly,

Did the defendant, Charles A. Shepard, administer the mercury to her as charged in the indictment?

The first question may not be difficult to answer. Men with years of experience and eminent in their line of work of pathology and toxicology, have testified. As to how much credibility and weight is to be given to their testimony is of course, within your province. Ordinarily, persons who have devoted their life work to one subject should and ought to know more than anyone else about that subject.

The history of the illness of the deceased is substantially that, when she became ill she collapsed and fell on the floor and was somewhat dazed; that she was taken to her bed and was unable to see distinctly and her mind apparently was confused; that within a few hours after her illness began, her mind began to clear up and her vision began to come back; that she complained of pain in her lower extremities; that she also vomited considerably shortly after she collapsed. As I recall, she was never able to hold any good of much quantity on her stomach or take nourishment of any kind during all of her illness; that within a week or ten days after her illness began she developed a sore condition of her mouth and around her gums, and suffered from alternate diarrhea and constipation; that at the time of her death, a great deal of her trouble seemed to be in her stomach and her abdominal regions.

581 According to the specialists who testified, all these symptoms are symptoms of mercurial poisoning. There was some evidence that these conditions could be produced by some other ailments, so it is well to go on further in the history of this case. This viscera was first given a partial examination by Major Hawley and Major DuFrenne who found that there were two ulcers in the stomach, one older than the other, in process of healing, the newer one estimated to be from a week to 10 days old. They also found in the large intestines a mass of ulcers, ranging in size from a pinhead I believe, the size of a 10-cent piece. These men not being certain as to what was the cause of the condition

of this viscera, delivered it to Major Mahon, or caused it to be delivered to Major Mahon, a pathologist, of Omaha, Nebraska. Major Mahon's description of the viscera has been given to you in evidence. He made a gross and microscopic examination and a complete pathological report of his findings of every part of the viscera. He also examined the viscera to see whether or not there were any bacteria known as Vincent's spirilla, and any other bacterial infection, and was unable to find any. From the condition of this viscera as he found it, and from the history of the illness of the deceased, and from the fact that later the metallic mercury was found in the viscera, he stated that the condition and picture found in the viscera was caused by mercury, and that with this information there was no question in his opinion that the person from whom this viscera had been taken, died from mercurial poisoning.

Parts of the viscera were then forwarded to Major Ash, a member of the United States Army, and attached to the medical corps at Washington, D. C., a pathologist with years of experience. He made a miscroscopic examination of this viscera, the results of which have been given to you here in the testimony, and, from a history of the illness of the deceased and from a pathological examination, and from the fact that mercury was found in a part of this viscera from his examination, was in his opinion, conclusive evidence that the person to whom this viscera belonged, died of mercurial poisoning.

Parts of this viscera were submitted to Colonel Vedder, and Mr. Muehlberger, and the results of their examinations have been told and shown to you during the progress of the trial. They appear to be men of wide experience in
582 their line. They estimated by a quantative analysis and one by a qualatative analysis that this viscera contained between two and three grains of mercury at the time of their examinations, and that in their opinion the deceased died of mercurial poisoning.

Now, these specialists told many interesting things about the action of mercury upon the human system. It appears that a lethal dose, or enough to kill, is somewhere between two and four grains, as I recall it.

It appears from the testimony that mercury when taken into the system in the form of bichlorid of mercury tends to

scatter throughout the system. It is carried by the blood. It deposits itself in the liver and kidney. One of its peculiarities, different from any other kind of poison, is that after coming in contact with the stomach, it passes on, misses the small intestine practically altogether, and reappears in the large intestine, and causes the formation of ulcers. That these ulcers make it impossible for the person having the same in their system to retain food of any kind, and they gradually waste away. Another interesting thing brought out by the evidence, about this mercury when taken internally is that if taken in a large dose it paralyzes the kidneys and may cause death within a few hours. However, it appears in this case the lesions in the kidney, or kidneys, were not great in number as compared to the lesions found when a large dose is taken at one time. From which I gathered that the pathologists thought that the mercury causing the pathology in the kidney was taken by more than one administration, otherwise the kidney would have been paralyzed and more lesions would have been shown. There was evidence of another peculiarity of mercury in that it tends to eliminate somewhat rapidly when taken into the system; that it is carried in the blood and is eliminated through the sweat glands, through the sweat glands, through the kidneys, and also causes a salivation of the mouth which seems to produce when excreting from the mouth a sore mouth condition such as has been described to you during the trial, that it also causes hemorrhages, in addition to the sore mouth.

Major Rose, a dentist, testified that about June 1, 1929, he prescribed a mouthwash to be used in the treatment
583 of the diseased mouth trouble, which he had diagnosed as Vincent's angina, or Vincent's stomatitis; that this was a solution known as 1 to 4000 solution, which was one-half hydrogen of peroxide, and that estimating that the solution if used as prescribed during the entire illness, the prescription would have had to be filled four or five times, and there has been testimony introduced that the deceased might have absorbed by the use of this mouthwash, if that quantity were used, enough mercury to account for the amount of mercury found in the viscera of the deceased.

Miss Brown the nurse, has testified that the deceased refused to permit the use of such mouthwash to any considerable extent, and that about one-half pint of such solution was used

in treating the mouth condition of the deceased, and that lavoris was used. Now, you are the judges of the credibility of the testimony of the witnesses on this question, as in all questions, and all other facts, and in determining this question you should take into consideration all the facts and circumstances introduced in evidence bearing on the probability of sufficient mercury to account for the mercury claimed to have been found in the viscera of the deceased being absorbed into the system of Mrs. Shepard by the use of such mouth wash, but all facts involved must be determined by you from all of the evidence, and you and you alone are the sole judges of the facts.

If you do find that Zenana Shepard, the deceased, died from the effects of mercurial poisoning, then the question remains did the defendant, Charles A. Shepard administer this poison to her as he is charged with doing in this indictment?

In answering this question you will of course properly consider all of the evidence in this case. Circumstantial evidence of course is the only kind of evidence you have as to the administration of this mercury, if it was administered, and it is from that kind of evidence you will have to decide whether or not this defendant is guilty of administering this poison to the deceased, if it was administered.

The evidence shows that the defendant was a physician as I have stated, and had been practicing his profession
584 since 1896. He states substantially in his own testimony that at any time he so desired he could go to the dispensary at Fort Riley and obtain bichlorid of mercury tablets; also that along about April 8, 1929, he wrote a prescription calling for about 8 ounces of alcohol with one bichlorid of mercury tablet dissolved in it. This tablet contains as I recall, about 7 or 8 grains of mercury. The defendant says that this prescription was obtained by him for the purpose of treating ears from the after effects of measles, it appearing that there had been or was a measles epidemic at Fort Riley about April 8, 1929. There was evidence that the defendant obtained bichlorid of mercury tablets the latter part of December, 1928, and others again in March or April, 1929, at the dispensary. There was evidence that about once a week the defendant was designated as what is known as the officer of the day, and as such officer, he had the keys

to the dispensary in which the poisons were kept. There was evidence also that bichlorid of mercury comes in at least two forms, one in the form of a blue tablet, and another in the form of a white powder, and that both of these poisons were kept at the dispensary. There was evidence that the defendant, in March or April, 1929, obtained two boxes of empty capsules. He states that in the course of his professional duties it was customary for him to obtain empty capsules.

All of these things together with all the other evidence in the case, may be taken into consideration by you for whatever they may be worth in deciding the question as to whether or not he had access to any poison or mercury, and whether he procured it, and if he procured the mercury, did he have any opportunity to administer it to the deceased, and if he had such opportunity, did he administer it?

Was there a motive or motives of any kind which would actuate him to administer to the deceased any poison of any kind? There was evidence that the defendant had become infatuated with one Grace Grandon of San Antonio, Texas. It
585 appears that the defendant became acquainted with Miss Brandon on or about November 1, 1928; that they began keeping company shortly thereafter; that this state of affairs continued until the defendant left San Antonio to return to Fort Riley, early in December of 1928; that after the defendant left San Antonio, he corresponded with Miss Brandon. The testimony shows, I think, he gave or sent her presents of various kinds, including a bracelet of the value of about $10, in the latter part of November, 1928; a toilet set of the value of $25 at Christmas, 1928; a ring in February, 1929; a canary bird, which reached Miss Brandon on May 20, 1929, an Easter lily for Easter, and flowers for Decoration Day of 1929, all before the death of Mrs. Shepard. There also appears to have been many costly presents and flowers and candy after Mrs. Shepard's death.

The defendant states that those given before the death of Mrs. Shepard were given only in friendship and admiration for Miss Brandon by the defendant and not because of any real love for her. As you will recall there was much agreement and some contradiction in the testimony of Miss Brandon and the defendant. There was both agreement and contra-

diction between other witnesses for the government and the defendant. I have attempted to mention only some of the important evidence. It will be your duty to reconcile the conflicting evidence so far as is possible and where it may be impossible, to give credence to that which the more strongly appeals to your reason and commonsense.

There was evidence tending to show that the deceased, Zenana Shepard had made threats of suicide and statements to the effect she wanted to die; also evidence as you will recall, tending to show she might have been poisoned by the mouthwash. Such evidence is competent for the purpose of showing she might have taken poison to end her life or that the mouthwash might have caused her death.

You should weigh the testimony of each witness as to whether or not he or she is corroborated in any of the matters he or she has testified to; whether or not the testimony he or she has given is reasonable or unreasonable, and entitled to your belief, and by taking all of the testimony as
586 you have heard it from the lips of the witnesses in the case, try to come to a correct conclusion.

Now, if you find and believe from the evidence in this case beyond a reasonable doubt that the defendant at the United States Military Reservation near Fort Riley, Kansas, feloniously, unlawfully, and wilfully, that is, intentionally, not accidentally, premeditatedly, deliberately and of his malice aforethought, killed and murdered Zenana Shepard, then it will be your duty to return a verdict against him of murder in the first degree.

You have been instructed gentlemen of the jury, that you can not convict the defendant of the crime charged against him unless and until you believe from the evidence beyond a reasonable doubt that he is guilty. But a reasonable doubt does not mean a mere possibility of innocence. It means a doubt arising out of the evidence in the case or lack of evidence. If, after a fair, impartial and dispassionate consideration of all of the evidence and of all the facts and circumstances in this case you cannot say to yourselves under your oaths that you are satisfied of the defendant's guilt, then you have a reasonable doubt and you must acquit him on that ground. But if, after you have given all these facts, circumstances and testimony in the case a fair, honest, impartial

and dispassionate consideration, you can then say to yourselves under your oaths that you have an abiding conviction that the defendant is guilty, then you have no reasonable doubt and in that event you must return a verdict of guilty against him.

It is your duty to consider these instructions as a whole. You should not pick out any part thereof and consider it singly and alone, but you should consider and construe each part in the light of and together with all the other instructions given, and so considered and construed they embody the law of the case. You are to consider the evidence as given to you from the witness stand and if counsel on either side, or if the court has in any way misquoted or misinterpreted the evidence you will disregard the misquotation and misinterpretation and rely entirely upon your recollection of the evidence as given to you on the witness stand.

You, *you* will be given forms of verdict and you will
587 use one of those forms when you have reached your verdict. The first form finds the defendant guilty of murder in the first degree without any recommendation or statement as to punishment. The second form finds the defendant guilty of murder in the first degree but adds the clause, "without capital punishment". The third finds the defendant not guilty.

When you have agreed upon a verdict you will reach, your foreman, whom you will choose from your number, will sign that verdict and you will then return it into court.

And you may have with you the indictment.

Filed in the District Court as part of the Transcript of Evidence on August 29, 1931.

[Citation in proper form, directed to Appellee, with acceptance of service by counsel for said Appellee, was filed in the District Court on Feb. 3, 1931.]

[Clerk's Certificate.]

United States of America, District of Kansas—ss.

I, F. L. Campbell, Clerk of the District Court of the
588 United States of America for the District of Kansas, do hereby certify the foregoing to be a true, full and correct copy of the record and proceedings in said court in case No. 5473, entitled The United States, Plaintiff, vs. Charles A. Shepard, Defendant, as designated in the Praecipe filed herein.

I further certify that the original Citation is hereto attached and returned herewith.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Topeka, in said District of Kansas, this 6th day of February, A. D. 1932.

(Seal) F. L. CAMPBELL, Clerk.

Filed Feb. 8, 1932. Albert Trego, Clerk.

And thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Tenth Circuit, viz:

Appearances.

For Appellant.

The clerk will enter my appearance as counsel for the appellant.

C. L. Kagey, Wichita, Kansas.

Hal M. Black, Wichita, Kansas.

L. M. Kagey, Beloit, Kansas.

A. E. Crane, Topeka, Kansas.

Filed Oct. 10, 1931. Albert Trego, Clerk.

The clerk will enter my appearance as counsel for the appellant.

Harry W. Colmery, Topeka, Kansas.

Filed Sept. 6, 1932. Albert Trego, Clerk.

For Appellee.

The clerk will enter my appearance as counsel for the appellee.

S. M. Brewster, Topeka.

L. E. Wyman, Topeka.

Filed Oct. 17, 1931. Albert Trego, Clerk.

(Order of Submission)

Forty-fourth Day, April Term, Tuesday, September 6th, A. D. 1932.

Before Honorable Robert E. Lewis, Honorable John H. Cotteral and Honorable Orie L. Phillips, Circuit Judges.

This cause came on to be heard and was argued by counsel, Harry W. Colmery, Esquire, and C. L. Kagey, Esquire, ap-

pearing for appellant, and S. M. Brewster, Esquire, and L. E. Wyman, Esquire, appearing for appellee.

On motion, appellant was granted leave to file twenty printed copies of a reply brief in this cause, instanter, which was accordingly done.

On motion, appellee was granted leave to file four typewritten copies of a brief in answer to the reply brief of appellant within two days from this day.

Thereupon this cause was submitted to the court.

Opinion.

No. 564—JANUARY TERM, 1933.

[January 9, 1933.]

Mr. C. L. Kagey and Mr. Harry W. Colmery (Mr. Hal M. Black, Mr. Harry S. Class, Mr. L. M. Kagey, Mr. L. W. Lundblade, Mr. A. E. Crane, Mr. Balfour S. Jeffrey, Messrs. Kagey & Black, Messrs. Kagey & Lundblade and Messrs. Doran, Kline, Colmery & Cosgrove were with them on the brief) for appellant.

Mr. S. M. Brewster, United States Attorney, and Mr. L. E. Wyman, Assistant U. S. Attorney, (Mr. Donald Little and Mr. Dan B. Cowie, Assistant U. S. Attorneys, on the brief) for appellee.

Before LEWIS, COTTERAL, and PHILLIPS, Circuit Judges.

COTTERAL, Circuit Judge, delivered the opinion of the court.

Charles A. Shepard was convicted of murdering his wife, Zenana Shepard, by poisoning, June 15, 1929, on the United States Military Reservation, at Fort Riley, Kansas. The verdict of the jury was returned without capital punishment and the defendant was sentenced to life imprisonment. He appeals, relying on eight assignments of error, which embrace complaints of (1) the exclusion of jurors; (2) refusal to direct a verdict for the defendant; (3) the admission of incompetent evidence; and (4) prejudicial comments on the evidence.

1. The defendant exhausted his peremptory challenges. Ten additional jurors were excused by the court, and others

were called and retained. Those excused had read an article printed in the Kansas City Star, purporting to emanate from the defendant, shortly before the trial. One of them, interrogated by the court and counsel for both sides, believed the article was a statement by the defendant, and answered he thought it would be considered. The others of those jurors were examined solely by the court, all had read the article, and they were excused without allowing inquiry from counsel for the defendant. The objections were to the excuse of these jurors, and to the denial of a motion to quash the panel on that ground.

The view of the court was reflected in a remark that the defendant may not put his statement in a newspaper, get it to the jurors and ask them to sit in the case. We quite agree it was not permissible for the defendant to create an atmosphere favorable to his defense and be tried by jurors subject to such influence. The newspaper article was introduced for the use of the court, but is not in the record. The trial court has the duty to pass on the qualifications of the jurors. Its action is not reviewable, unless it discloses an abuse of discretion. While there was no showing that the defendant wrote or inspired the article, the court had the discretion to determine its effect; and no error arose because the court examined the jurors. Remus v. United States, 291 F. 501; Assaid v. United States, 10 F. (2d) 752; Hopt v. Utah, 120 U. S. 430, 435; Northern Pacific R. R. Co. v. Herbert, 116 U. S. 642, 646. In any event, the defendant has no ground of complaint, as he was tried before an impartial jury. Hayes v. Missouri, 120 U. S. 68; Howard v. Kentucky, 200 U. S. 164.

2. The motion to direct a verdict is based on the insufficiency of evidence to warrant the conviction. The prosecution claims the defendant poisoned his wife, with the motive of marrying Grace Brandon, with whom he had become enamored. We condense the evidence of guilt to the point that will illustrate its sufficiency.

The defendant and his wife were married at Los Angeles, in 1916. He is a medical officer in the United States Army, and was commissioned as a major during the World War. Since that time he has been stationed at various posts, and in 1928 was transferred to Fort Riley, Kansas. His wife accompanied him. In that year, leaving his wife at Fort Riley, he took

a flight surgeon's course at Brooks Field, near San Antonio, Texas. While there, he met Grace Brandon and took her to dinners, dances, theatres, and other places of entertainment. He told her he and his wife were not congenial, but kept up appearances for the sake of his rank and reputation. In November, 1928, at Neuvo Laredo, Mexico, he asked Miss Brandon to marry him if he should get a divorce; and she assented. The promise was repeatedly made. He protested his love for her, and frequently made her gifts of candy, flowers, jewelry and other articles. Hs asked her to write to him at Junction City, Kansas, where he rented a post office box. He wrote to her often, occasionally several times a day, until after his arrest.

In his letters he spoke of their marriage, and shortly before his wife became ill he wrote Miss Brandon his wife had changed her mind about a divorce, and he was depressed because of her request for an excessive financial settlement; also that he had made over to Miss Brandon his life insurance of about $30,000. The correspondence with her was addressed in affectionate terms. In May, 1929, a few days before Mrs. Shepard became ill he ordered a canary bird sent to Miss Brandon, but it did not reach her until two days before Mrs. Shepard's illness began.

Soon after his return from San Antonio in December, 1928, the defendant obtained some bichloride of mercury tablets from the pharmacist at the post dispensary. He obtained other such tablets there in March, 1929, and in the following month he obtained a prescription for a like tablet dissolved in eight ounces of alcohol. In his statement made to the agents of the Department of Justice he denied the fact, but in his testimony said all doctors carried the tablets for disinfectant purposes. He also obtained from the dispensary about two hundred empty capsules. He had access to the dispensary and had the keys to it every five or six days, as officer of the day.

Mrs. Shepard enjoyed good health. In the afternoon of May 20, 1929, she went to Junction City to mail a letter. After her return defendant gave her a ginger ale highball. Later that evening, Mrs. Gertrude Skow, in answer to a call from Mrs. Shepard during her absence, telephoned the Shepard home and talked with the defendant, who told her that Mrs. Shepard was desperately ill and the doctor was there.

She and Mrs. Constance Gates, another friend of Mrs. Shepard (both wives of army officers), called at the Shepard home but did not see her, and were told by the defendant she had gotten some bad liquor. Major Edward J. Strickler, a psychiatrist summoned by defendant, called at eight o'clock. At about nine o'clock, defendant called Mrs. Skow, asking her to stay with Mrs. Shepard until he could go for a nurse. He met Clara Brown, a nurse from Topeka, at Junction City, and she arrived that night. He told the nurse Mrs. Shepard had a nervous breakdown, and she need not keep a record of the case. Mrs. Shepard was found delirious and vomiting, and her eyes were dilated. The defendant prepared capsules for Mrs. Shepard and the nurse gave them to her, one at a time. He said the capsules contained sodium bicarbonate and luminol. There were others he said contained bismuth.

The next day, the defendant told Alice McDonald he did not think the patient would get well. Mrs. Shepard suffered and had hemorrhages. Defendant told Major Martin DuFrenne he thought she was a chronic alcoholic, and had a chronic appendix. He also told Major Paul R. Hawley she had heart trouble. But no evidence was found of either condition. Her mouth became sore and foul and a dentist prescribed a wash containing mercuric chloride, but she used only a little of it. She lingered until she died on June 15, 1929.

The defendant opposed an autopsy asked by the officers, but yielded when it was ordered by General Symonds. The viscera were examined by several specialists and revealed the presence of mercury, taken in small doses. They agreed it was the cause of death. This is practically conceded by counsel for the defendant.

Shepard went with the remains to Los Angeles for cremation. Before he left, he advised Miss Brandon of the time of his departure, and stated that he would be at the Roslyn Hotel. He wired her the night of his arrival. On June 29, he wired General Ireland a request for a transfer to the hospital at Fort Sam Houston, near San Antonio. He wrote to Miss Brandon while en route from Los Angeles to Fort Riley. Immediately after his return, he obtained leave to go to Denver to sell some lots, but went directly to San Antonio, arriving there on June 30. The day previous, he wired Miss Brandon from Waco he would telephone her on arrival at

hotel, signing, "Love, Charlie." He met her and while driving with her, proposed a secret marriage. On her refusal, they fixed their wedding date for August, 1930. He continued to send her gifts and bought her a car. He made repeated efforts to obtain a transfer to San Antonio.

There was such an array of circumstances pointing to defendant's guilt as to leave no doubt of its sufficiency to withstand the motion for a directed verdict.

3. The main testimony objected to was that of Sergeant J. C. Gresser and the nurse, Clara Brown, admitted in rebuttal. The Sergeant testified that on the fourth or fifth day of her illness, Mrs. Shepard said she believed she was being poisoned. Nurse Brown testified Mrs. Shepard said on the second day of her illness "she was being poisoned," and "Doctor Shepard has poisoned me."

The testimony of these witnesses was not admissible as dying declarations. There was testimony that Mrs. Shepard said she would not get well, had made threats of suicide, and did not want to recover; and it is a fair inference she believed she would not recover. But there is no evidence that she believed death was impending or about to ensue. Death need not actually follow as anticipated, but it is necessary that the patient believe it to be imminent. It is then an exception to the rule excluding hearsay arises, the temptation to falsehood being removed. Mattox v. United States, 146 U. S. 140; Wigmore on Evidence (2nd ed.) vol III, secs. 1440, 1441. The testimony of Sergeant Gresser was that the statement of Mrs. Shepard was not one of fact but opinion, and for that reason it was not admissible as a dying declaration. Wigmore on Evidence (2nd ed.) vol. III, sec. 1447; 30 C. J. p. 274; Ehrhardt v. People, 51 Colo. 205, 117 Pac. 164.

But we are convinced the declarations were admissible to rebut the theory of suicide, advanced by the defense. The statements imputed to Mrs. Shepard that she contemplated suicide and did not expect or want to get well, reflected the state of her mind and tended to show the poison was self-administered. To rebut that testimony, the declarations that her husband had poisoned her and she believed she had been poisoned were clearly competent as tending to show a different state of mind. State v. Kuhn, 117 Iowa 216, 90 N. W.

733; 30 C. J. p. 165; Mutual Life Ins. Co. v. Hillmon, 145 U. S. 285; State v. Hayward, 42 Minn. 474, 65 N. W. 63; Commonwealth v. Trefethen, 157 Mass. 180, 31 N. E. 961.

It is argued that as the testimony was not of dying declarations, it was error to admit it, unless the jury was instructed as to the purpose for which it might be considered. There is authority for the contention. It was held error to omit the instruction where the evidence was long or involved, in a conspiracy case. Minner v. United States, 57 F. (2d) 506. But the general rule, which should be applied here, requires the adverse party to request such an instruction when he desires the benefit of it, and it was not done in this case. Butler v. United States, 53 F. (2d) 800; Moffat v. United States, 232 F. 522; Hallowell v. United States, 253 F. 865, 258 F. 237, (certiorari denied 249 U. S. 615; 251 U. S. 559); Stassi v. United States, 50 F. (2d) 526. Instead, when the instructions were finished, counsel for the defendant stated he was satisfied with them. This foreclosed objections to them. Mann v. United States, 49 F. (2d) 131; Najera v. Bombardieri, 46 F. (2d) 281; Wong Tai v. United States, 273 U. S. 77.

Objection is urged to the introduction in evidence of various letters which were written by defendant to Miss Brandon, those he wrote to the concerns from which the gifts were obtained by him for her, and to the articles sent to her. The argument is the court abused its discretion in admitting those exhibits. The obvious answer is they tended to establish a motive on defendant's part to perpetrate the crime charged. There is no force whatever in the objection.

The account given by the defendant to the agents of the Department of Justice is assailed. He stated he was advised as to his constitutional rights and made his statement freely and voluntarily. An admission given under such circumstances is properly received in evidence. Perovich v. United States, 205 U. S. 86, 91; O'Neill v. United States, 19 F. (2d) 322.

The introduction of Mrs. Shepard's letters to her kin and mother were also questioned. They were offered to show the frame of her mind as being opposed to suicide. They were admissible on the same grounds as were her conversations.

4. Finally, it is urged that the court indulged in prejudicial

comments upon the evidence, in ruling upon the objections. Those pointed out by counsel do not sustain their complaint. There were unwarranted remarks to counsel in different instances, but they were insufficient to constitute reversible error.

The charge to the jury is assailed in that it reviewed the evidence in favor of the prosecution in more detail than that favoring the defense. This was a natural course, in view of the burden to establish the offense by circumstantial evidence. But it suffices to say that the charge was accepted as satisfactory by the defendant's counsel.

We are of the opinion that the record discloses no material error, and for that reason the judgment in this case is

AFFIRMED.

PHILLIPS, Circuit Judge, dissenting:

Nurse Brawn testified, in response to a question propounded by the Court during the introduction of the Government's evidence in rebuttal, "She (Mrs. Shepard) said, ' 'Dr. Shepard has poisoned me'." The United States Attorney, apparently believing that such evidence was inadmissible, requested the Court to strike it. Thereupon the Court instructed the jury that the evidence was stricken and withdrawn from their consideration.

The following day the United States Attorney recalled Nurse Brown and undertook to lay a foundation for this evidence as a dying declaration. Nurse Brown testified that Mrs. Shepard on the second day of her illness said "she was not going to get well; she was going to die"; and that on subsequent occasions Mrs. Shepard said "she was going to die." Following this preliminary evidence, the following proceedings occurred.

> "Q. At the time she told you, on the second day that you were there, that she was going to die, did you, at that time and in that connection, have a conversation with her in reference to her condition?
>
> "A. Yes.
>
> "Q. What was it?

"Mr. Kagey: We object to that as hearsay, not made in the presence of defendant, incompetent, irrelevant and immaterial.

"The Court: You may answer.

"Mr. Kagey: We except.

"The Court: Read the question, Mr. Reporter.

(Last question read as above recorded.)

"A. She asked me if I would do her a favor. I consented. Then she told me to go to Major Shepard's room and, in his closet, get a quart whiskey bottle off the shelf.

"Mr. Kagey: What kind of a whiskey bottle?

"The Witness: It was a quart.

"Mr. Kagey: A quart?

"The Witness: Yes. It was a dark green whiskey bottle, with a whiskey label, which she said was the one—

"Mr. Brewster: Did you make more than one trip before you brought the bottle?

"A. I did.

"Q. Go ahead and state what she said to you.

"A. She asked me to smell the contents. I did so. She then asked me if it smelled peculiar. I told her I did not know. She asked how much was in the bottle. I noticed there was not more than a tablespoonful; there was not more than a tablespoonful; and told her.

. . . . .

"She said she knew there could not be but a small amount, because the last time she had taken a drink out of that bottle, she made a remark to Major Shepard, that there was not only enough for about one more drink, and she was going to save that until she needed it. She asked me if that was enough to test for poison. I told her I did not know.

"Mr. Brewster: Now, go ahead and state what, if anything she said as to how she took sick and what she did.

"Mr. Kagey: We object to that as incompetent, irrelevant and immaterial, hearsay, not rebuttal testimony, incompetent, irrelevant and immaterial.

"The Court: She may answer.

"Mr. Kagey: We except.

"A. She stated that this was the bottle from which she drank just before collapsing on the evening of May 20.

"Mr. Brewster: Q. What did she say as to the taste of it the night she took sick, the 20th?

"Mr. Kagey: Object to this as leading.

"Mr. Brewster: What, if anything?

"Mr. Kagey: Objected to for the further reason that it is hearsay, not rebuttal, a conversation not shown to have been made in the presence of the defendant.

"The Court: You may answer.

"Mr. Kagey: Except.

"A. It was altogether different.

"Mr. Brewster: What did she say? Give her words.

"A. It was not good.

"Q. Did she say anything about how it tasted?

"Mr. Kagey: Same objection.

"The Court: You may answer.

"Mr. Kagey: Except.

"A. She said she was being poisoned.

"Mr. Brewster: What did she say? Give her words?

"Mr. Kagey: All right; we object to this, also, as incompetent, irrelevant and immaterial, hearsay, not made in the presence of the defendant, not rebuttal.

"The Court: You may answer.

"Mr. Kagey: Except.

"A. She said: 'Dr. Shepard has poisoned me'."

To render the statements of Mrs. Shepard admissible as dying declarations, it was essential to show that they were made under a belief of certain and almost immediate dissolution. Mattox v. United States, 146 U. S. 140; Carber v. United States, 160 U. S. 553; Carver v. United States, 164 U. S. 694. Wigmore on Evidence, 2nd Ed., Secs. 1438-1441.

The Government failed to establish that Mrs. Shepard, at the time she made such statements, believed her death was certain and imminent. The statements, therefore, were not admissible as evidence of the facts stated.

It is my opinion that this evidence was not admissible to show a state of mind for the purpose of refuting other declarations showing a state of mind disposed to suicide.

The existence of a plan or design of a person to do a specific act is relevant to show that the act was done. Such a plan or design may be evidenced by the person's conduct; and since a plan or design is a state of mind, its presence or absence may be evidenced by the person's declarations relevant thereto. Mutual Life Ins. Co. v. Hillmon, 145 U. S. 285; Kerr v. Modern Woodmen of America (C. C. A. 8) 117 Fed. 593; Farrar v. Locomotive Engineers Mutual L. & A. Ins. Association, 143 Minn. 468, 173 N. W. 705; Wigmore on Evidence (2d Ed.) Vol. 3, Sec. 1725. But such declarations are competent to show only the mental state of the person, and not the facts stated in the declaration. In re Carson's Estate, 184 Cal. 437, 194 Pac. 5; Calkins' Estate v. Calkins, 112 Cal. 296, 44 Pac. 577. Therefore, where the declaration is a narration of a past event, it is not admissible as proof that such event happened unless it is part of the res gestae or a dying declaration. Calkins' Estate v. Calkins, supra; Shafler v. Bumstead, 99 Mass. 112; Potter v. Baldwin, 133 Mass. 427; Waterman v. Whitney, 11 N. Y. 157, 168; Marx v. McGlynn, 88 N. Y. 357, 374; Bush v. Bush, 87 Mo. 480; Griffith v. Diffenderffer, 50 Md. 466.

A person disposed to commit suicide is as susceptible of being murdered as one not so disposed. Therefore, the statement that the defendant poisoned Mrs. Shepard, or that she believed that he poisoned her, would not refute the fact that she intended to commit suicide. It would only show that she did not carry out any such intention. It would in no wise indicate her state of mind with respect to suicide. Its sole probative value was as evidence of the facts stated. In other words, to have any relevancy, it would have to be considered by the jury as evidence of a substantive fact, and not of a mere state of mind.

Clearly neither Mrs. Shepard's opinion as to the cause of her death, nor her statements as to the cause of her death—foundation for their admission as dying declarations being absent—were admissible to prove that the defendant murdered her, and therefore she did not commit suicide.

While a statement that she desired to live, that she had future plans which she desired to carry out, or like declarations by Mrs. Shepard would have indicated a present state of mind not disposed to suicide and would have been admissible to show such state of mind a mere narration of past events not inconsistent with a disposition to commit suicide did not show a state of mind with respect to suicide and was inadmissible for any purpose.

Furthermore, since such statements are not made in court and the declarant is not subjected to the test of cross-examination, they should only be admitted where the facts bring them within the Necessity principle, and there are circumstantial guarantees of trustworthiness. Wigmore on Evidence, 2nd Ed., Vol. 3, Secs. 1725, 1714, 1421 and 1422. While the facts in the instant case bring the declarations within the Necessity principle, such guarantees are not present. The statements occurred after the cause of Mrs. Shepard's death had been set in motion. They were not in the nature of verbal acts indicating a present state of mind, but were a narration of past event. Had she taken poison with suicidal intent, she might have been disposed to conceal it, and it would have been no more than a human failing to have laid it at the door of her husband, for whom she had confessedly lost all love and respect. At the time they were made she was ill, her mental condition was abnormal, and there was no showing that she believed her death was certain and imminent. The facts, instead of indicating the presence of circumstantial guaranties of trustworthiness, cast doubt upon the reliability of the statements. Therefore, even if such declarations tended to show the state of Mrs. Shepard's mind, they were inadmissible. Wigmore on Evidence, 2nd Ed., Vol. 3, Sec. 1722.

But if such declarations were admissible, not as evidence of the facts stated but to show Mrs. Shepard's state of mind to rebut any inference of suicide from other statements she had made, it was the duty of the Court to so limit them by proper instructions. Minner v. United States (C. C. A. 10) 57 F. (2d) 506; Wilson v. State, —— Tex. Crim. Rep. ——, 39 S. W. 373; Maines v. State, 23 Tex. App. 576, 5 S. W. 123. In the latter case the court said:

> "The general rule is 'that whenever extraneous matter is admitted in evidence for a specific purpose, incidental to, but which is not admissible directly to prove the main issue, and which might tend, if not explained, to exercise a strong, undue, or improper influence upon the jury as to the main issue, injurious and prejudicial to the rights of a party; then it becomes the imperative duty of the court in its charge to so limit and restrict it as that such unwarranted results cannot ensue; and a failure to do so will be radical and revisable error, even though the charge be not excepted to'."

The majority say the failure to give such instruction was waived by the omission of defendant's counsel to request it, and by their failure to except to the charge as given.

They undertake to distinguish the instant case from the Minner case by saying that the record in the latter case was long and involved. With all deference to the majority, the record in this case is larger and more involved than was the record in the Minner case.

That a defendant may be "waived" into the penitentiary for life is repugnant to my conception of justice.

Furthermore, since the evidence was offered and admitted as dying declarations, that is, as proof of the substantive fact, and not to show a state of mind, it is apparent such a request or objection would have been futile. An instruction so limiting it would have been inconsistent with the theory upon which it was offered and received.

However, even if this court is not bound to notice such error, our rules provide and we have held that it may not do so.

In Bogileno v. United States (C. C. A. 10) 38 F. (2d) 584, the court said:

> "We recognize the general rule that a complaining party must call the attention of the court to any

claimed error in the trial proceedings at the time it occurs and if he fails to do so an appellate court will not, usually, consider such claims, although the errors complained of are clearly prejudicial.

. . . . .

"'But there is an exception to this rule as well established, as just and equitable, as the rule itself. It is that in criminal cases, involving the life or liberty of the accused, the appellate courts of the United States may notice and correct, in the interest of a just enforement of the law, serious errors in the trial of their cases, fatal to the defendant's rights, although these errors were not challenged or reserved by objections, exceptions or assignments of error'."

In New York Cent. R. R. Co. v. Johnson, 279 U. S. 310, the court said:

"The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted. . . . The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion and prejudice. . . . . Where such paramount considerations are involved, the failure of counsel to particularize an exception will not preclude this court from correcting the error."

See also Lamento v. United States (C. C. A. 8) 4 F. (2d) 901, 904; Van Gorder v. United States (C. C. A. 8) 21 F. (2d) 939; Crawford v. United States, 212 U. S. 183, 194.

There was evidence that shortly after Mrs. Shepard became ill she developed a severe case of Vincent's angina (Trench Mouth), and that a major in the Dental Corps of the United States Army, of broad experience in the treatment of that disease, diagnosed it as such and prescribed a mouthwash containing mercuric chloride, and that she used about five pints of such mouthwash. The history of her case indicates she received the mercury in small quantities over a period of time

and not in one lethal dose, and reputable medical experts testify she might have absorbed it through the membrane of the mouth in sufficient amounts to have caused her death. There was other evidence tending to show that Mrs. Shepard may have taken bichloride of mercury accidentally or with suicidal intent. It is a well known medical fact that acute nephritis is always present in cases of bichloride of mercury poisoning, and the autopsy disclosed little, if any, inflammation of the kidneys. The absence of nephritis makes it doubtful that Mrs. Shepard received sufficient quantities of the mecury to have caused her death. In view of these facts, it cannot be said that the proof of guilt was conclusive.

The statements of Mrs. Shepard, admitted broadly as evidence of the facts stated, undoubtedly were largely responsible for the jury's verdict of guilty.

I think the admission of the declarations for any purpose was error. But, if they were admissible for a limited purpose, it was error not to confine the jury's consideration thereof to that limited purpose by proper instructions. Such error was not negative like a mere failure to instruct upon a point, but positive in that the jury was permitted to consider the evidence as proof of a fact of which it was no proof.

For these reasons I am of the opinion that the defendant should be granted a new trial.

(Judgment)

First Day, January Term, Monday, January 9th, A. D. 1933.

Before Honorable John H. Cotteral, Honorable Orie L. Phillips and Honorable George T. McDermott, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Kansas and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

It is further ordered by the court that Charles A. Shepard, appellant, surrender himself to the custody of the United States Marshal for the District of Kansas, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said District Court.

PETITION FOR REHEARING.

Filed Feb. 27. 1933.

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Charles A. Shepard, the appellant herein, respectfully requests this Honorable Court to grant a rehearing of this cause, in which, on January 9, 1933, it affirmed the judgment of the United States District Court for the District of Kansas. Believing that the human rights of this appellant have not been properly safeguarded, and that the constitutional guaranties have been disregarded, the attention of this Court is invited to the following matters in which the majority of this court have erred to the prejudice of the appellant.

I. DOES "FAIRNESS TO THE COURT" TRANSCEND "FAIRNESS TO THE ACCUSED" UNDER THE AMERICAN SYSTEM?

Counsel who write this petition, free from bias, prejudice, or notions which might arise from participation in the trial below, have searched the entire record, and, giving that full weight and consideration to it which it deserves, are firmly convinced that the appellant stands convicted upon evidence, which, if given its strongest probative effect, may justify suspicion, but falls deplorably short of proof of crime.

At the time the errors were made in the trial court, accused was on trial for his life. Under a Government established to protect the rights of its citizens to life and liberty, there is charged upon the courts a grave responsibility to see that human rights are preserved, and that one shall not forfeit life or liberty except upon the most cogent and convincing proof. And that responsibility is more intense and should be exercised with most extreme care and caution where it is sought to take a man's life or deprive him of his liberty by circumstantial evidence. No one has stated this duty with greater force and clarity than Justice Weaver in *State v. Kuhn*, 117 Ia. 216, when he said:

> "It is the most ancient and sacred principle of our law that no person shall be legally branded a felon or suffer forfeiture of life or liberty except upon the most cogent and convincing proof. No matter how grave the charge, nor how strong the suspicion under which he rests, he is entitled to go into court unburdened with any presumption of guilt, and to have every element of the alleged crime established by evidence beyond a reasonable doubt before a verdict of guilty can be justly pronounced against him. *Indeed, the graver the charge*

the stronger the suspicion, the more insistent the popular demand for conviction, the more careful should be the courts to see that these essential safeguards of human rights are preserved unbroken. It is natural and inevitable that a charge of murder under any circumstances in a peaceable and orderly community should arouse intense and general interest, and even where the utmost care is exercised it is difficult to wholly eliminate passion and prejudice as factors in judicial investigation of the crime. *If, then, to the charge of murder we add the element of mystery; if there be no eye witness of the act, and the crime is to be made out, and the guilty party detected by a process of reasoning or deduction from circumstances brought together from various sources, and woven into a connected fabric of proof, the difficulty of holding the scales of justice evenly is multiplied manifold.* It is not my purpose to disparage circumstantial evidence. It is an essential and indispensable instrument in the administration of justice. It is nevertheless a dangerous instrument, which, if not wisely and conservatively applied, may easily work the grossest injustice. *The importance of detecting crime and punishing criminals is not to be overlooked, but it is of no less importance that no person shall be convicted or punished upon anything less than the full measure of proof required by the established rules of law.*" l. c. 231-2.

The function of the appellate court is not to determine the guilt or innocence of one accused of crime, but only whether he has had that fair and impartial trial guaranteed him under the Constitution, and, if there be any serious doubt about it, to make sure by another trial, that the accused does have a fair and impartial trial. This function was stated in characteristic fashion by the late Judge Sanborn, in *McNutt v. United States*, 267 Fed. 670, 673, when he said:

"The purpose of the review by appellate courts of trials in the courts below is to ascertain whether, according to recognized rules of procedure, those trials were fair and impartial, and if in a criminal case, there is serious doubt about it to make sure by another trial that the accused has a trial that is fair and impartial. If this purpose is to be really and practically accomplished, both trial and appellate courts must serve to

> find out the actual effect upon the jury of the action of counsel for the parties and of the court which tries the case."

We note that substantially one-half of the majority opinion is devoted to a recital of the "evidence of guilt" taken from the Government's testimony albeit the error briefed and argued was the overruling of the request for a directed verdict of acquittal at the close of the defendant's evidence and at the close of all the evidence.

Can it be that this Court unconsciously, first determined that the appellant was guilty, and then, having prejudged the case on its merits, found justification for the errors, admittedly made, in the failures of counsel, and thus placed the so-called "fairness to the court," which has a duty to perform, above and paramount to "fairness to the accused," who has rights to be protected? Did this Court, having satisfied its subconscious mind of the guilt, find it is justified in stating to the accused,

> "You cannot put a statemennt in the newspaper for jurors to read, and thus create an atmosphere favorable to the defense and ask to be tried by jurors subject to that influence. Although there is no showing that you either wrote or inspired such an article, even though you did not, the trial court has determined that you did and disqualified the jurors, and his action is not reviewable."

Or, having found that the Brown and Gresser testimony was not admissible as dying declarations because not surrounded by guarantïes of trustworthiness, yet hold that the same testimony was admissible to refute the theory of suicide, without the guaranties of trustworthiness? Or, find that it was error to admit such testimony even for that purpose unless the jury were instructed as to the limited scope for which it could be used, but condone that error because counsel did not request a proper instruction? Or find that the Court made unwarranted remarks to counsel but pass them off with a wave of the hand as not constituting reversible error, completely ignoring the stigma of condemnation which the trial court placed on the defendant, when, without reason, he stated that:

> "the defendant could not put his statement in the newspaper, and get it to all the jurors, and ask the jurors to sit in the case;"

and further ignoring the trial court's statement in the presence of the jury that he had no doubt as to the competency of the Nurse Brown testimony, the most prejudicial and damaging evidence in the case? Or, to dodge the question as to whether the Court's statements of the evidence were judicial and dispassionate, and favorable to the accused as well as to the Government, by stating that the error complained of is that the Court "reviewed the evidence in favor of the prosecution in more detail than that favoring the defense," and, tacitly admitting that there was error in this regard, wave it aside by stating that the charge was accepted as satisfactory by the defendant's counsel? Is the ancient conception of Justice being "blind" so as not to decide on appearances alone, to be transformed to a blindness which fails to see and protect those unfortunates facing deprivation of life or liberty and to shield them from the inadvertence, neglect, carelessness, or ignorance of counsel?

II. THE COURT ERRED IN HOLDING THE TESTIMONY OF NURSE BROWN AND SERGEANT GRESSER ADMISSIBLE TO REBUT THE THEORY OF SUICIDE.

A. The principle announced in the majority opinion is not supported by the authorities cited. To be competent such evidence must be surrounded by guaranties of trustworthiness and a showing of circumstances free from suspicion of misrepresentation. This evidence lacks these requisites.

1. THE CASE OF STATE VS. KUHN, 117 IA. 216.

Appellant wishes to re-examine the propriety of the Court's ruling on the competency of the declarations by Mrs. Shepard reported on the witness stand by Nurse Brown and Sergeant Gresser that "she was being poisoned" and "Doctor Shepard has poisoned me."

This Court has ruled that the testimony of Nurse Brown was not admissible for the truth of the matter asserted as a dying declaration, because Mrs. Shepard did not believe at the time of the statement that her death was certain and imminent. And, in addition, the declaration reported by Sergeant Gresser was opinion. However, it is stated in the opinion of this Court that the evidence was to rebut the defense theory of suicide and to show the state of mind of deceased not to be suicidal. Evidence is introduced in rebuttal to

meet a new issue of fact tendered. It must be competent the same as that introduced in the case in chief, and must be tested by the rules of admissibility. Rebuttal evidence may be testimony offered for the truth of the facts stated, or may be offered where the utterance, regardless of its truth, has probative value in that a statement by a person just as his actions, generally are circumstantial evidence of the basis for an inference of a material fact. If valid for the latter purpose, it is considered original evidence in hearsay, and hence there is no question of it coming within a recognized exception to the hearsay rule. When admitted for that purpose, Professor Wigmore has called it a verbal act. Wigmore, Secs. 1715 and Secs. 1766-1792.

It is clear, from the opinion of the Court, that the declarations in question here were not admissible for the truth of the matter asserted to rebut the defense of suicide, but that they were competent as circumstantial evidence to bottom an inference that deceased had no intention to commit suicide and hence, through still another inference, did not commit suicide.

Several cases are cited in the Court's opinion which are stated as authority for the above ruling in this case. Defendant wishes to direct the Court's careful attention to those cases and submits, however proper the rulings made in them may be on their own facts, that they are not applicable in rule or reasoning to the case at bar.

The case of *State v. Kuhn*, 117 Ia. 217 (1902) is the first case cited to support the admissibility of these declarations as a foundation from which to infer a state of mind. A careful reading of the opinion will show (l. c. 223) that one Snider was aroused by a call for help and upon going to the road in front of his home, found the deceased and his wife, the accused. The deceased said he was dying and that "she (defendant) poisoned me, Snider." "She did it, yes, sir, she did." Those statements were repeated while on the way to a doctor and at that time the declarant was having spasms and finally died from strychnine poisoning. All of these declarations were made in the presence of the accused.

The evidence was offered at the trial and admitted with no restriction over the objection of defendant. In its general instructions the trial court said,

> "As you find from the evidnce that the witness Snider came to the buggy and after he was in the buggy, the

deceased declared and stated, in the presence of the defendant, in substance, that the defendant had poisoned him. It is proper for you to consider the acts and conduct of the defendant at the time such declarations and statements were made by the deceased, together with all the other facts and circumstances established by the evidence in arriving at your verdict."

The jury was thus permitted free use of the evidence as truth of the matter asserted. The Supreme Court of Iowa held that was not error. The ruling was thus that the declaration was proper for truth. The Court considered it was a part of the *res gestae* and hence the truth could be used to rebut the defense of suicide. It was not for a rebuttal of suicidal intent alone from which the fact of poisoning by defendant is left to inference, but it was for the truth of the facts stated in the declaration. The Court went further and said it was also admissible for a dying declaration. Nowhere in that opinion does the Court mention the problem before this Court in the case at bar, namely, a declaration for a limited purpose to form a basis from which a certain state of mind could be inferred, regardless of the truth of the statement. The problems of the two cases are utterly different and the rule of the Kuhn case can in no way be made applicable to the case at bar. The distinction between the cases can be noticed by a glance at the following tabulation:

KUHN CASE.	SHEPARD CASE.
1. Statement made in presence of defendant.	1. Statment not made in presence of defendant.
2. Declaration made in extremis.	2. Declaration not made in extremis.
3. Declaration made in expectation of immediate death.	3. Declaration not made in expectation of immediate death.
4. Statement admissible for truth of the matter asserted, especially to rebut defense of suicide, but might be used for any purpose.	4. Held not admissible for truth.
5. Opinion does not consider doctrine of a verbal act showing state of mind.	5. Held admissible as a verbal act to show state of mind.

The difference between these cases is a real difference and to predicate the ruling in the Shepard case upon the authority of the Kuhn case is error.

2. THE DECLARATIONS OF MRS. SHEPARD WERE NOT SURROUNDED BY GUARANTIES OF TRUSTWORTHINESS AND WERE NOT MADE AT A TIME AND UNDER SUCH CIRCUMSTANCES AS TO BE FREE FROM SUSPICION OF MISREPRESENTATION.

Before examining the remainder of the cases cited on page 6 of the majority opinion, the appellant desires to point out some uncontroverted facts which are important to bear in mind when considering those authorities. Were the declarations of Mrs. Shepard made at a time and under such circumstances as to be surrounded by guaranties of trustworthiness and free from suspicion of misrepresentation? This Court is not even silent. In holding that the declarations were not admissible as dying declarations, it has answered a positive "No."

Major Hawley, a witness for the Government, testified that when he first saw Mrs. Shepard during her illness on May 21 (the *very day of the declaration* testified to by Nurse Brown):

> "Mrs. Shepard was in bed, weak, ill, gave a history as having vomited a great deal the evening before and throughout the night, was still nauseated, the pupils dilated, weak, had a slight mental confusion which could be pentrated, that is, she could answer intelligently if you repeated your questions and was in a general condition which might be a mild collapse or recovery from collapse. She apparently got better (Tr. 63). * * * When I came to see her the morning after I think Major Shepard told me about her mental condition the night before. When I called to see her she had slight confusion and loss of memory. She did not show any particular cerebral excitability like 'picking things out of the air.' Major Strickler may have told me of her symptoms although I have no recollection. Symptoms like she had I think could be caused by alcohol" (Tr. 89).

Major Strikler, a witness for defendant, testified that he was called the first night of Mrs. Shepard's illness (Tr. 354) and attended her daily during four or five days (Tr. 355).

He described her at his first call (and that before declaration to Nurse Brown) as follows:

> "Mrs. Shepard was lying in bed, fully clothed, and was apparently hearing voices. She continually reached out, as if picking objects out of the air, brushing them off of her bed, and she was blind to the extent that she could not recognize fingers held in such a manner (indicating) before her eyes, and she complained of some numbness in her lower extremities. The pupils of her eyes were widely dilated, there was no reaction to light, and her knee-jerks were absent, and—could not be obtained. * * * The odor of alcohol was very strong on her breath."

Diagnosed the condition as polyneurotic alcoholic psychosis; that is,

> "simply a disorder of the mind characterized by these hallucinations, and the idea that she had been doing certain things which she had not done, and this mental picture was associated with the neuritis, which included the impairment of her vision, amounting to practical blindness, the loss of knee-jerks and her complaint of numbness in the extremities" (Tr. 354).

At the end of the first week of her illness Major Strickler described her condition as:

> "Impairment of vision had improved and it was possible to break through her confusion and get some relevant and coherent answers from her (Tr. 356). * * * The plain fact that Mrs. Shepard had been confined to her bed for a number of days, she would tell me how she had gone down to Junction City that morning, or sometime during the day, and the various shops she had visited, the various ladies of the post she had conversed with, and how they would come home, and how they had spent the afternoon, all of which was uttterly impossible" (Tr. 356).

Nurse Brown, witness for the Government, testified:

> "When I arrived, Mrs. Shepard's condition was, she was in bed, very ill, and delirious and had been vomiting. The next day she seemed better. For a few days she got better. With reference to her mental condition, she gradually cleared up. It was just a few days before it apparently cleared up. Her eyes were dilated

(Tr. 137). * * * Mrs. Shepard was very ill and delirious. She talked in her delirium and I think she picked things out of the air, and her vision was blurred. She complained of disturbance of her vision" (Tr. 139).

Mrs. Gates, a witness for the Government, testified that when she arrived the evening on which Mrs. Shepard was taken ill, Mrs. Shepard's condition was as follows:

"She was in bed with her clothes on. She was delirious. The pupils of her eyes were very large. She did not recognize me at that time. She did not recognize me at all that evening" (Tr. 56).

Major Dye, one of the attending doctors and a witness on behalf of the defendant, testified *that on the morning of the declaration made to Nurse Brown,* Mrs. Shepard's condition was as follows:

"I noticed her vision. She could see things very dimly, she knew color in front of her vision, she could see, but she could not count fingers. Her vision was blurred. I thought her eye condition at that time was due to salicylic acid. I think possibly it could have been due to the use of bad liquor, bootleg liquor. I have never seen in mercuric poisoning, the conditions of the disc and retina as I have described it" (Tr. 360).

The foregoing testimony of both the Government and the defendant, as to Mrs. Shepard's condition, at about the time of the making of the declarations, draw a picture of a woman utterly incompetent to make, with clearness and accuracy and free from suspicion, a statement that would bare her true state of mind. The only state of mind it reveals, under these facts, is a condition of confusion that could not be relied upon. It is a picture of a mind like that tormented with insanity and irresponsibility. To those conditions of serious physical illness and mental unbalance must be considered the human unwillingness to publicly admit suicidal intent while still alive, and the natural willingness to wildly blame, in times of stress, someone often closest, as intimate friends or spouse, for results visited upon one through self faults. It only adds to the suspicious circumstances and chances of misrepresentation that played so vividly around the declarations of Mrs. Shepard.

Another circumstance should be noted by the Court which points suspiciously toward the unreliability of this evidence.

It goes to both the circumstance surrounding the making of the declaration by Mrs. Shepard and to the reliability of the reporting by Nurse Brown. Nurse Brown, in answer to questions whether she had reported the statements of Mrs. Shepard before the trial, said:

> "I did not tell anyone about it. The first time I told anyone about it was after her death * * *. There were six or seven doctors on the case while I was there. Q. Do you mean to say that you were on that case for twenty-five days, after you had been told by Mrs. Shepard that she was poisoned, and her husband had poisoned her, and poisoned her with this specific liquor; and never said a word to a soul about it? A. Yes, because she took me into her confidence" (Tr. 565).
>
> "Q. Do you think that excused you? That is your excuse.
>
> A. Yes, because I promised her I would not tell.
>
> Q. You promised her you would not tell?
>
> A. Yes.
>
> Q. You thought she knew what she was doing when she told you that?
>
> A. Yes, I think she was.
>
> Q. You never told a soul about it?
>
> A. No.
>
> Q. When did you first tell any of the government detectives here?
>
> A. Not until they came to see me.
>
> Q. Not until they came to see you? When was that?
>
> A. That was, I think, in December, I am not sure, but I think it was in December."

A registered nurse attending a case the exact nature of which was baffling to three or four doctors had failed to report a statement by the person ill that she was poisoned, which would have provided the clue for proper medical treatment, all because the sick woman had revealed it in confidence and upon promise not to tell. It is impossible to escape the conclusion that Nurse Brown either considered it an irresponsible statement and sick room chatter, made by a person delirious and in such circumstances of suspicion as to be unworthy of consideration and reporting, or that it was an afterthought on the part of Nurse Brown.

If it was the former, the evidence was incompetent under the Hillmon, Hayward and Trefethen cases, *supra*, all cited

by this court in the opinion. If it was the latter, possibly "the wish was father to the thought."

3. THE AUTHORITIES AS CITED IN THE MAJORITY OPINION SHOW THAT SUCH DECLARATIONS MUST BE FREE FROM SUSPICION OF MISREPRESENTATION.

The law, as applied to the so-called verbal act doctrine, is developed with clearness in *Insurance Company v. Hillmon*, 145 U. S. 285 (1892) cited by the Court as authority for the competency of the declarations in question.

It is submitted that the law of the Hillmon case, if applied to the facts in the case at bar, provides positive authority for excluding the evidence in question. In that case, the action was for recovery on a life insurance policy. The defense was a conspiracy to defraud and that the insured was not dead. The evidence introduced in the trial by plaintiff tended to show that Hillmon was traveling from Wichita on a trip to southern Kansas in search of a site for a cattle ranch and was killed by the accidental discharge of a gun one night, about March 18, 1879, while camping with several others on the banks of a creek. The defendant introduced evidence tending to show the body found in the camp that night was not the body of Hillmon, but that of one Walters. The defendant offered letters and testimony of the contents of letters written by Walters from Wichita, to his betrothed and to his parents in Iowa, showing that he expected to leave Wichita, with Hillmon, about March 5 and go west in search of a site for a sheep ranch and to work for Hillmon. The trial court refused to admit the evidence. The Supreme Court of the United States held the evidence competent for a restricted purpose—not to show that Walters did go on the trip with Hillmon, but to show his intention or state of mind to go, on the theory that it was a verbal act indicating circumstantially a condition of mind (l. c. 295-296). But Mr. Justice Gray, in writing the opinion, was careful to point out that the letters were "written by him (Walters) at the very time and under circumstances precluding a suspicion of misrepresentation."

A showing of circumstances, free from suspicion of misrepresentation, has been the rule of all cases since that time before such evidence becomes competent. It is the circumstantial guarantee of trustworthiness and constitutes the only safeguard the opponent has. Wigmore, Secs. 1772-76, 1479 and 1422.

The declarations in the Hillmon case were made at a time when declarant was free in his mind, before any possible question of controversy had arisen and entirely free from those surrounding circumstances that raise only suspicion of intentional or non-responsible misrepresentation. Contrast that with the facts at bar where the circumstances surrounding the declarations, as pointed out above, were such as to not only raise a suspicion, but show that the statement revealed only a confused and delirious mind. The statement, when considered with those circumstances, does reveal a state of mind; but it is a mind that is not reliable.

Commonwealth v. Trefethen, 157 Mass. 180, 31 N. E. 961, is another of the cases cited. It arose from the trial of a murder of a woman by an accused seducer. The defense of suicide was set up and declarations of the young woman made the day before her death, that she was five months pregnant with child and wanted to know what to do about it and that she was going to drown herself, were excluded by the trial court. The Supreme Judicial Court of Massachusetts, Chief Justice Field writing the opinion, held:

> "The fundamental proposition is, that an intention in the mind of a person can only be shown by some external manifestation, which must be some look or appearance of the face or body, or some act or speech; and that proof of either or all of these for the sole purpose of showing state of mind or intention of the person is proof of a fact from which the state of mind or intention may be inferred (l. c. 186) * * * although this is not evidence that what that person said was true" (l. c. 187).

It should also be noted that in the Trefethen case, the declaration:

> "Evidence of which was offered contained nothing in the nature of a narrative and was significant only in showing state of mind or intention of the deceased" (l. c. 188).

Here again the circumstances surrounding declaration are pointed out as important and "the declaation if made was made under circumstances which exclude any suspicion of an intention to make evidence to be used at the trial" (l. c. 194).

That factor must be considered and the reasoning of the Trefethen case is grounded on the freedom from any suspicion at the time of declaration as are other authorities. Pro-

fessor Wigmore points out that there is a limitation on the use of such statements. Sec. 1725, Vol. 3, p. 696.

State v. Hayward, 62 Minn. 474, 65 N. W. 63, is the last of those cases cited by the Court. The defendant was charged with murder by procuring, inducing and aiding another to kill a young woman. A witness on behalf of the state testified that she had conversed with the deceased a few hours before her death; that witness asked deceased to go home with her to dinner to which the deceased replied, "that she had a business engagement with Mr. Hayward" (l. c. 484). The Supreme Court of Minnesota held it to be no error to admit that statement in evidence to the jury because,

> "This statement forms a connected part of the evidence, and tends to characterize her subsequent acts and her departure on the fatal ride soon after she made the statement. This statement was not mere self-serving hearsay evidence, but a verbal act, just as revelant as would be evidence that prior to her departure she put on her cloak or hat. Similar evidence of the declarations of the deceased prior to his departure was held competent in each of the following cases" (l. c. 484).

The theory of the majority of the Court was thus that the declaration was admissible as part of the *res gestae* and proof of the fact contained in the declaration. The case as cited by Mr. Justice Canty in the quotation above was decided on that theory. It is not the theory upon which the declarations of Mrs. Shepard where held admissible by this Court in case at bar. Chief Justice Start writes a concurring opinion in the Hayward case which points out the difference in the two theories. He does not consider the statements as admissible under the *res gestae* exception, but justifies their admission as competent because there was circumstantial evidence of an inference of state of mind. That is the theory on which this Court has apparently admitted the declarations of Mrs. Shepard. Chief Justice Start states the rule to be:

> "That, when the question is whether a person did a certain act, his declarations, oral or written, made prior to and about the time he is alleged to have done an act, to the effect that he intended to do it, are admissible as original evidence, if made under circumstances precluding any suspicion or misrepresentation. *Mutual L. Ins. Co. v. Hillmon*, 145 U. S. 285, 12 Sup. Ct.

909; *Com. v. Trefethen*, 157 Mass. 180, 31 N. E. 961" (l. c. 497).

Professor Wigmore quotes that statement by Mr. Justice Start with approval in Sec. 1726, Vol. 3, p. 702, Wigmore. Here again it is stated that the declaration, to be competent, must be "made under circumstances precluding any suspicion or misrepresentative." The circumstances surrounding the declaration in the case at bar are pointed out on pages 7-10. They do not satisfy the condition required to make the evidence competent to show state of mind.

B. The declarations were not admissible because not relevant to the issue.

Declarations offered as circumstantial evidence for state of mind, even though they satisfy the tests of trustworthiness and free from suspicion must still be relevant to the particular issue. On the theory under which the declarations were admitted the material issue is, whether Mrs. Shepard committed suicide. It is said the declarations were admissible to bear upon that, but to reach an answer to that question, inference must be piled upon inference three deep. The process of connecting the relevancy is more complicated than appears at first blush. The declaration is not a direct statement of intent nor state of mind, nor of a plan or design. It is a statement which is only circumstantial evidence of no intent or design to commit suicide, and then only such, by reading into it all an inconsistency between a suicidal state of mind and the commission of a murder. Thus, before picturing the state of her mind, there must be an inference drawn in the mind of the juror, and based on her statement, that her intention was not to commit suicide. It is not as though she had made a direct statement of her intent. In *Commonwealth v. Trefethen, supra* (declaration of intent to drown self), *State v. Hayward, supra* (intent to fulfill an appointment) *Insurance Company v. Hillmon* (intent to go on a trip) there were direct statements of present intent. In none was the issue arrived at by inference.

It is also different than where a specific intent is the ultimate question, as in proof of *animus furandi* in a charge of larcency. From the inference that there was no intent to commit suicide, another inference must be drawn that she did not in fact commit suicide. The process does not stop there, if the ultimate question is to be reached. Another inference that since deceased did not kill herself, there must have been a murder and, from there, by the aid of other

evidence, only, can it be spelled out that the defendant committed it.

Thus, the relevancy of the declarations in question is remote and furnishes only a basis for an inference three steps removed from the issue to be determined. The danger of submitting evidence to a jury of laymen, which can only be relevant in such a process, is manifest. Before the steps from one inference to another can be taken with certainty, other evidence may be taken into consideration, and to balance such factors approaches the impossible, especially for a jury. It is to safeguard from the hasty judgment of the jury room and to protect from evidence which is prejudicial in nature and remote in relevancy that such evidence is excluded.

It further appears to appellant that the relevancy of the declaration here, to the issue of suicide, can be a basis for that remote starting inference—that a murder was committed, *only*, if the statement was taken for the truth of the matter asserted; that is, Dr. Shepard poisoned her. This court has ruled in its opinion that this evidence may not properly be taken for the truth of the facts it related. The mere fact that Mrs. Shepard spoke is not relevant to the issue. The relevancy only exists because of what she said and because of its truth. If there is no truth to what she stated, it does not reveal the state of her mind nor does it show that she did not commit suicide—the ultimate issue for which it was held to be admissible by this Court.

We urge this Court most earnestly to examine carefully the reasoning of Judge Phillips on the question of the admissibility of these declarations to show a state of mind and the authorities cited by him in the dissenting opinion. The logic is forceful and sound by which he arrives at the conclusions that this evidence is not admissible to show a state of mind for the purpose of refuting other declarations showing a state of mind disposed to suicide; and that to have relevancy it would have to be considered as a substantive fact and not showing a mere state of mind, and that in any event it lacks the circumstantial guaranties of trustworthiness.

III. THE COURT ERRED TO THE PREJUDICE OF THE APPELLANT IN RULING THAT THE ERROR OF THE TRIAL COURT IN FAILING TO RESTRICT THE USE OF THE BROWN AND GRESSER TESTIMONY, WAS WAIVED BY A FAILURE OF APPELLANT'S COUNSEL TO REQUEST A SPECIFIC INSTRUCTION FOR THAT PURPOSE AND IN ACCEPTING THE COURT'S INSTRUCTIONS AS SATISFACTORY.

This evidence was offered in the first instance for the very purpose for which this Court has held it improper, that is, as *res gestae* (Tr. 526). When reoffered it is quite apparent that an effort was made to lay the foundation for a dying declaration and that the testimony was offered as such for truth of the facts asserted (Tr. 562-6). Neither the United States District Attorney nor the Court ever had any idea of introducing it for the limited purpose of showing a state of mind. Under such circumstances it would not have availed appellant anything to have requested an instruction limiting the use of this testimony for the reason that it would have been overruled as not having been offered for that purpose. May the Government, some 18 months later, in preparing and arguing its appeal to this Court, completely change its theory as to this evidence and contend that the appellant should have requested an instruction consistent with the theory adopted by the Government for the purpose of presenting its case to the appellate court, but which was never thought of at the trial? And will the Court take this position on the Government's behalf?

Appellant respectfully prays this Court to consider again the very serious question of whether the defendant is to suffer the prejudicial effect of having all objections to instructions of the trial court foreclosed by the failure of counsel to request a specific instruction or to object and except to those given. The declarations of Mrs. Shepard held to be competent by this Court for a restrictive purpose only were allowed to go to the jury without a restrictive instruction by the trial court.

In approaching this question, it is of the utmost importance that certain considerations be kept in mind. Constitutional right of fair trial and the attending rules of law safeguarding that right have often been misused by defendants charged with a crime. That has lead to a strict construction of those

constitutional rights. But whatever rights the accused may have must not be invaded when the charge is serious.

The appellant here is charged with a crime of the highest gravity. It is a crime that is punishable by life imprisonment or death. There was evidence introduced, the competency of which was earnestly and seriously controverted with reason. That evidence was of a nature highly prejudicial in the appellant's case. There could be nothing greater at stake. Doubt must be resolved in his favor.

A picture of the Court's opinion on the question of this evidence is not without aid in reaching a result. The Court first rules that the declarations in question were not competent to prove the truth of the facts they recited. Then it is decided the conversation is competent only for a certain restricted purpose and finally that free use may be made of the evidence in spite of ruling that it was not proper for the truth of the facts, because counsel for appellant failed to request instructions and in fact stated he was satisfied with the instructions given.

Admitting that *Minner v. U. S.*, 57 F. (2d) 506, is authority to the contrary, this court distinguishes that case on the ground that the record was long and involved. The Minner case had 253 pages in the original record, the Shepard case 588. The Minner case had 330 pages in the printed record, the Shepard case 592. The Minner case had 29 witnesses, the Shepard case 79. And the Minner case took three days for trial and the Shepard case approximately 18 days. The mass of conflicting evidence in the Shepard case could not have been more involved. Other authorities cited in the majority opinion of the Court are distinguishable on valid grounds and do not present the precise question of this case.

In *Butler v. U. S.*, 53 F. (2d) 800, there was this important factor present that does not exist in this case:

> "Toward the close of the trial the Court said to counsel, in the hearing of the jury, that he expected to charge the jury as to the purpose of such evidence—that the collateral transactions were admissible as bearing upon the question of whether the method used was 'deliberately pursued.' We think this was quite as effective as if it had been said in the final charge, although undoubtedly the Court would again have so instructed if counsel had recalled it to his mind."

The contrary occurred in the case at bar. The trial judge, at the time the conversation was first introduced by the Gov-

ernment and then withdrawn on government motion, expressed himself before the jury as having no doubt of its competency for the purpose for which it was then offered—the offer made for the truth of the matter (Tr. 527).

In *Moffat v. U. S.*, 232 F. 522, and *Hallowell v. U. S.*, 253 F. 865, the crime charged was the use of mails to defraud. In the latter case the question arose on the admissibility of letters passing between co-conspirators other than the appellant, Lick, and the Court said that even though the request had been made it would have had to have been overruled because the evidence was competent as acts and declarations of one co-conspirator against another. In *Stassi v. U. S.*, 50 F. (2d) 526, and *Mann v. U. S.*, 49 F. (2d) 131, the charge was violation of the prohibitory act. *Najera v. Bombardieri*, 46 F. (2d) 281, was a case for civil recovery in tort. In *Wong Tai v. U. S.*, 273 U. S. 77, the charge was conspiracy to violate the opium act.

It is to be also noted that in none of the cases cited was the evidence admitted or the instruction omitted of such a prejudicial nature as that evidence admitted here to a jury which, unaccustomed to the rules of evidence, would use it for its most obvious purpose—the truth of the facts contained which this Court has ruled an improper use. As such it supplied the vital link which the Government required to prove the crime against this appellant and the trial court in first permitting it to be presented to the jury announced in their hearing that he had no doubt of its competency. When it was withdrawn he made no effort to particularize—explain what it was being withdrawn for; then he permitted it to go in again without any thought of restriction but for truth of the facts asserted and then he permitted it to go to the jury without any limitation as to its scope. Thus the jury was left to deal at will with testimony of this nature undirected and uncontrolled by specific instructions. Prejudice was sure to follow.

Where certain evidence is of such a character as may naturally be misapprehended by the jury, confused and improperly accorded weight on issues for which the evidence is not competent, it has been held error for the trial court, after request of counsel, to refuse a direction for which the evidence may be used. *Hollenback v. Hand et al.*, 189 F. 929; *North Central Coal Co. v. Hughes*, 224 Fed. 57; *Woody v. Mut. Power & Light Co.*, 54 F. (2d) 220.

If that is true, it is hard to reconcile a ruling that if counsel does not request it, and defendant is prejudiced thereby, that the mistake is not available on appeal. The injury is as real as though refused upon request, and after it is thought important enough to be a ground of reversal in those situations, it would seem that essential justice was not done in cases of those classified within which the case at bar falls, keeping in mind the highly prejudicial character of the evidence and the serious nature of the crime.

If complete justice is to be done in a trial for a serious crime, certainly the Court as well as counsel has a duty to see that the evidence is properly introduced and the jury is advised of the proper use of it. Errors would be avoided and appeals reduced. The Court is more than a passive referee with a right and duty to speak only as spoken to, when the matters involved are so absolutely vital to the defendant's rights in a criminal case.

The majority opinion has adopted the general rule that the complaining party must call the Court's attention to any claimed error, or make a specific request, if required, and that if he fails to do so the appellate court will not listen to him. It has refused to recognize in this case the "exception to this rule as well established as just and equitable as the rule itself, beginning with *Wiburg v. U. S.*, 163 U. S. 632; 41 L. Ed. 289, that in criminal cases, involving life or liberty of the accused, the appellate courts of the United States may notice and correct, in the interest of a just enforcement of the law, serious errors in the trial of their cases, fatal to the defendant's rights, although these errors were not challenged or reserved by objection, exception or assignments of error."

This exception has been recognized in *Skuy v. U. S.*, 261 Fed. 316, on a perjury case, as to unfair cross examination and argument; in *McNutt v. U. S.*, 267 Fed. 670 (8th Circuit) a retail liquor dealer case, sentence 17 months, fine $100.00; as to reminding a witness of the penalty for perjury in the presence of other witnesses; in *Lamento v. U. S.*, 4 F. (2d) 901 (8th Circuit), a post office offense with five year sentence as to failure to request directed verdict of acquittal; in *Bogileno v. U. S.*, 38 F. (2d) 584 (10th Circuit) paying money to influence—sentence six years, as to error in instructions which invaded province of jury; in *Reynolds v. U. S.*, 48 F. (2d) 76 (10th Circuit) unlawful possession of whiskey as to charge to the jury. In this case Judge Cotteral wrote the opinion; *Stassi v. U. S.*, 50 F. (2d)

526 (8th Circuit), an unlawful possession of whiskey case; in *Ayers v. U. S.*, 58 F. (2d) 609, a national prohibition act case, as to insufficiency of evidence; and *Minner v. U. S.*, 57 F. (2d) 506, for error in instructions. The principle has been recognized lately in *Brasfield v. U. S.*, 272 U. S. 448; 71 L. Ed. 345.

In the light of the foregoing, can it be said that this, a murder case, does not merit consideration of the admitted errors, vitally affecting appellant's right to life and liberty? We respectfully urge the court to examine these authorities, with confidence that the instant case merits the application of the exception to the rule, upon the application of which this court will not waive appellant into the penitentiary for life because of the mistakes of counsel.

IV. THIS COURT ERRED IN REFUSING RELIEF FROM PREJUDICIAL COMMENT AND INSTRUCTIONS TO THE JURY, BECAUSE APPELLANT'S COUNSEL HAD ACCEPTED THEM AS SATISFACTORY.

For the reasons stated in the point preceding, we submit that careful consideration should have been given to the character of the Court's comments on the evidence, to which we took exception. This Court's attention is respectfully invited again to pages 32-38 of the reply brief filed herein. The statement in the majority opinion omits much material uncontradicted evidence. It was the trial court's failure to place this evidence before the jury—not as more or less detail, but as evidence of probative value, material to the defendant's case, that was the subject of the Assignment of Error.

This appellant was entitled to have the jury determine whether all hypotheses of the cause of Mrs. Shepard's death than mercurial poisoning administered by him were excluded. Bearing in mind that the Government's theory of the crime was mercurial poisoning administered by Shepard—*and that* its first theory was that Mrs. Shepard collapsed on the night of May 20th from a large dose, as evidenced by a large ulcer found in the stomach (Tr. 167, 70-9, 511); that later it developed that she could not have lived for 21 days if such was the fact; and that it must have been taken in small doses over a period of time; that Mrs. Shepard was disgusted with life, did not want to live, expected to die soon, and took morphine and drank alcoholic liquor excessively (see reply brief reference p. 36); that Major Strickler, who first attended her, diagnosed her case as typically alcoholic and not mercurial poisoning (Tr. 358-9); that Major Rose and Major

Dye diagnosed her as a Vincent's Angina, the former treating her for that up to her death (Reply Br. 35-6).; that Dr. Faust said it was not mercuric poisoning because the characteristic suppression of the urine was absent (Tr. 88, 166, 131, 511). Bearing in mind these things, it was unfair and prejudicial for the court to pass off all the testimony as to other causes of death and negativing mercurial poisoning, by merely stating that "there was evidence tending to show that the deceased, Zenana Shepard, had made threats of suicide and statements to the effect she wanted to die, and that Rose had diagnosed her trouble as Vincent's Angina."

And as to the manner in which the mercury may have reached the viscera other than at the hand of appellant, we respectfully invite the Court's careful consideration to pages 36-8 of our reply brief. There is an abundance of strong evidence by both Government and defense witnesses showing that death may have been due to absorption of mercury through the mouth wall, a fact hardly mentioned to the jury by the Court. The amount of mercury mouthwash used was important. But the Court only told the jury what Nurse Brown said had been used—one-half pint—and didn't mention the testimony of five pints. The Court lay emphasis on appellant's having access to the dispensary and getting prescriptions for bichloride of mercury; but made no mention of the fact that mercury was carried by all doctors, used for disinfectant, and was being used by defendant and others at the particular time to treat running ears, during a measle epidemic at the post.

That is to say, the Court, at the close of an 18 day trial, told the jury that a murder had been committed (Tr. 583) which, in the light of conflicting testimony as to the cause of her death, evidence of suicidal intent, and the circumstantial evidence, placed a definite emphasis on the weight of the testimony, and indicated to the jury that the proper finding was murder.

The Court then himself excluded all other hypotheses by saying to the jury, "Did this woman die of mercurial poisoning?" and answered it by saying, "The first question may not be difficult to answer" (Tr. 585), and then having determined the method, asked them whether Shapard had administered the mercury without mentioning that she might have received it by absorption as shown by an abundance of testimony. In other words, the Court in the opening part of his

charge to the jury in substance said to them, "It looks to me like a murder has been committed, and if it has been it was by mercurial poisoning and it must have been by Charles Shepard."

Thereafter the Court features a discovery of the mercury in the viscera, that the death was caused by mercurial poisoning, and that Shepard had the opportunity to have administered it and practically ignores every other theory of the crime, in connection with which the evidence showing that Mrs. Shepard's death could have been caused by Vincent's Angina; by a weakened condition due to excessive alcoholism possibly precipitated by the extraction of three devitalized teeth against which the post dentist had warned (Tr. 372), and the very cogent evidence that a mercurial mouthwash had been used in sufficient quantities to have produced the amount of mercury found in the viscera and that her death could have been caused by mercurial poisoning due to absorption of the mercury from that mouthwash.

We respectfully submit to the Court that a careful examination of these items as set out in the reply brief filed herein on pages 33-8 can leave no possible doubt but that the trial court did not even make an effort to direct the jury's attention to the evidence of probative value which tended to establish other hypotheses with reference to the cause of the death. This was prejudicial error, and for reasons already stated the appellant should not suffer the loss of liberty for life therefrom just because counsel did not request or object to instructions given.

V. THE COURT ERRED IN HOLDING THAT THERE WAS NO ERROR IN THE CHOOSING OF THE JURY PANEL.

The majority opinion holds that under the duty of the trial court to determine the qualifications of jurors he may summarily disqualify the seven jurors who had read a newspaper article pertaining to the case without asking them any questions whatever as to what opinion they had, if any. That is, the Court had the discretion to determine the effect of the article without asking the juror what effect it had had on him and the action of the Court in that regard is sought to be justified by the statement that "It was not permissible for the defendant to create an atmosphere favorable to his defense and be tried by jurors subject to such influence"—well knowing as it stated that "there was no showing that the defendant wrote or inspired the article."

Are the constitutional rights of the accused to be measured and hedged in by a snoopy and overzealous press? The Court cites authorities to support its statement that *no error arose because the Court examined the jurors. The error complained of was not that the Court examined them but the Court neither examined them nor permitted them to be examined*—but on the contrary disqualified them summarily, and that was an abuse of discretion.

In *Reynolds v. U. S.*, 98 U. S. 145 (which rules *Hopt v. Utah*, 120 U. S. 430, cited by the Court) it was said by Justice Waite that the theory of the law is that the juror who has formed an opinion cannot be impartial; that upon a trial of the issue of fact raised by a challenge the Court must determine the nature and strength of the opinion; that the question is one of mixed law and fact to be tried like any other issue of that character, upon the evidence, and that the finding of the trial court ought not to be set aside unless the error is manifest.

All the cases cited by the majority opinion hold only that the judgment of the Court as to competency of jurors is conclusive in the absence of an abuse of discretion. In fact the case of *Remus v. U. S.* specifically states that in determining this question:

> "The Court should consider the statements made under oath by the juror himself in reference to his impartiality and his freedom from prejudice."

So the cases cited in the majority opinion fail to reach in any wise or support the error complained of here. But it is stated that the appellant cannot complain because he was tried before an impartial jury. In *Hayes v. Mo.*, cited in the opinion, the accused had not exhausted his peremptory challenges. And in *Howard v. Ky.*, counsel had agreed that the Court might examine a juror and disqualify him if certain facts were elicited. The fact is, we are unable to find any federal cases which bear directly on the point involved in this case. The right of the trial court to determine the qualifications of jurors is not absolutely final, otherwise the courts would not have stated that it could be reviewed in the event of an abuse of discretion. But the matter has been touched squarely in the state courts in the cases of:

State v. Willie, 58 So. 147 (La.).

Welsh v. Tribune Publishing Co., 47 N. W. 562 (Mich.).

State v. Diedtman, 190 Pac. 117 (Mont.).

Aaronson v. State, 27 Atl. 937.

Hildreth v. City of Troy, 4 N. E. 559.

The principle deducted from all of these cases is that a court has no right of peremptory challenge; that an accused need not take a jury selected for him by the Court; that an accused is not only entitled to a fair and impartial jury but to a jury selected by methods established by law and that it cannot be said that no injury results to the accused "because he still had a fair and impartial jury" for he is entitled to have the benefit of the range of selection from the panel, not limited by disqualifications not based upon a determination of the fact.

Under all the cases in the state courts where the question has been raised, the action of the trial court in this case in excusing and disqualifying the seven jurors without making an attempt to determine whether or not they had an opinion which would make them impartial would be prejudicial error.

For the foregoing reasons we respectfully urge upon the Court that it is better to err in favor of and not against the life or liberty for life; that the accused did not have a fair and impartial trial under the safeguard of proper constitutional guaranties, and that a rehearing should be granted.

Respectfully submitted,

HARRY W. COLMERY,
BALFOUR S. JEFFREY,
C. L. KAGEY,
L. M. KAGEY,
Attorneys for Appellant.

DORAN, KLINE, COLMERY AND COSGROVE,
KAGEY AND BLACK,
of Counsel.

Certificate of Counsel.

We, the undersigned attorneys for Charles A. Shepard, appellant, hereby certify that the questions involved in the foregoing petition for rehearing, in our opinion, are substantial, meritorious, and well founded in point of law, and are not interposed for delay and that the rehearing should be granted.

(Signed) HARRY W. COLMERY,
(Signed) C. L. KAGEY,
Counsel for the Appellant.

(Opinion)

No. 564—JANUARY TERM, 1933.

[April 5, 1933.]

Mr. Harry W. Colmery, Mr. Balfour S. Jeffrey, Mr. C. L. Kagey, Mr. L. M. Kagey, Messrs. Kagey & Black and Messrs. Doran, Kline, Colmery & Cosgrove, filed petition for appellant.

Mr. S. M. Brewster, United States Attorney; Mr. L. E. Wyman, Mr. Donald Little and Mr. Dan B. Cowie, Assistant United States Attorneys, for appellee.

Before LEWIS, COTTERAL, and PHILLIPS, Circuit Judges.

ON PETITION FOR REHEARING.

COTTERAL, Circuit Judge, delivered the opinion of the court.

It must have been an undue zeal that prompted counsel in casting the imputation upon this court that it in any way prejudged appellant's case, and found the errors justified in the "failures of counsel," especially since this court passed over certain fatal objections to a review of the rulings upon the evidence and the instructions to the jury. Rule 11 of this court requires assignments on questions of evidence to quote the full substance of the evidence admitted or rejected. But there was a total omission to comply with the rule. The instructions are not subject to review, because they do not appear in the bill of exceptions, and are only certified by the clerk. United States v. Taylor, 147 U. S. 695; Clune v. United States, 159 U. S. 590; Addis v. United States, 62 F. (2d) 329. Appellant was therefore not entitled to be heard upon the objections to the testimony of Nurse Brown or Sergeant Gresser, or to contend that the instructions were faulty in not limiting the consideration of that testimony by the jury to rebuttal of the suicide theory. But arriving at the same result, we did not notice these objections as we might have done and might well now do, and preferred, owing to the gravity of the case, to decide the questions raised on the assumption they were reviewable.

We adhere to the ruling that the declarations of Mrs. Shepard were competent testimony. The doctrine upon which

they were admissible is thus stated in Mutual Life I. Co. v. Hillmon, 145 U. S. 285. At page 295 thereof, it is said:

> "A man's state of mind or feeling can only be manifested to others by countenance, attitude or gesture, or by sounds or words, spoken or written. The nature of the fact to be proved is the same, and evidence of its proper tokens is equally competent to prove it, whether expressed by aspect or conduct, by voice or pen. When the intention to be proved is important only as qualifying an act, its connection with that act must be shown, in order to warrant the admission of declarations of the intention. But whenever the intention is of itself a distinct and material fact in a chain of circumstances, it may be proved by contemporaneous oral or written declarations of the party."

The principle of that case is of course not open to question. It has been applied as an exception to the hearsay rule by the text writers and the courts: 3 Wigmore on Ev. (2nd ed.), sec. 1725 et seq.; 4 Chamberlayne Mod. L. Ev., sec. 2654; 11 Ency. Ev. 418; 22 C. J. 284; State v. Hayward, 62 Minn. 474, 65 N. W. 63; Commonwealth v. Trefethen, 157 Mass. 180, 31 N. E. 961; United States v. O'Brien, 51 F. (2d) 37; Brawner v. Royal Indemnity Co., 246 F. 637; Lusk v. Phelps, (Okl.) 175 Pac. 756; The San Rafael, 141 F. 270.

The state of mind or intention of a deceased person at a given time may become a distinct matter of proof. It is undoubted that Mrs. Shepard came to her death from mercurial poisoning. The defense was the poison was self-administered. Threats of suicide on her part were put in evidence, reinforced by her declarations that she did not want or expect to live. The tendency of that evidence was to show both her state of mind as averse to living and her intention to commit suicide. The objection of the defense was not tenable to opposing evidence in rebuttal on the same subject. It is within the distinct office of rebuttal to explain, repel, counteract, or disprove the evidence of the adverse party. Claycomb v. State, (Okl.) 211 Pac. 429. Mrs. Shepard's declarations introduced by the government were not merely narrative of a past event. In ascribing the poisoning to another, they tended to contradict the making of declarations imputed to her by the defense and to disprove a state of mind or inten-

tion disposed toward self-destruction. The evidence on both sides was relevant upon the issue of suicide or murder.

It is said the evidence in this case justifies suspicion but falls deplorably short of proof. We had not thought it necessary to specially comment in our original opinion on the force of the circumstances. We summarized the more important evidence favorable to the government. As there stated, the defendant had access to and obtained mercurial tablets, he prepared tablets for the nurse to give to his wife, he opposed the post mortem, he sought to wed Grace Brandon, and he lavished gifts upon her. It suffices to quote from Burns v. State, (Okl.) 129 Pac. 657, at page 663, where it was said: "Both sacred and profane history furnish many examples showing that illicit love is a most powerful motive for and fruitful source of assassination." See also McClintock v. State, (Okl.) 232 Pac. 853.

The point is emphasized that the declarations were not made under circumstances indicating trustworthiness. The rule conditioning their admission is not questioned. Evidence is cited to show the disordered condition at times of Mrs. Shepard's mind. One answer is that the declarations introduced by the defense were open to like objection. But it was a preliminary matter for the trial judge to determine whether the witness was mentally competent. His ruling was presumably correct and it is not reviewable unless it was clearly erroneous. New York Evening Post v. Chaloner, 265 F. 204; District of Columbia v. Armes, 107 U. S. 519; Dutton v. Atlantic C. L. R. Co., 88 S. E. 263, affirmed 245 U. S. 637. We are not persuaded that error occurred. The ultimate question as to the weight of the evidence was one for the jury.

Counsel still insist that the instructions were faulty in not limiting without request the consideration by the jury of the declarations of Mrs. Shepard. The evidence itself was competent. The settled rule is that the request was indispensable. It was not dependent, as counsel urge, on the grade of the offense. The principle was applied by the Supreme Court in a prosecution for murder. Goldsby v. United States, 160 U. S. 70. The complaint of the instructions therefore fails for want of an appropriate request by the defense. Nowhere is the rule more clearly stated that errors not reserved will not be noticed than in an opinion of this court, delivered by

JUDGE LEWIS, in Bogileno v. United States, 38 F. (2d) 584, where it was held they must be serious and fatal to defendant's rights. Wiborg v. United States, 163 U. S. 632; Brasfield v. United States, 272 U. S. 448; Gillette v. United States, 236 F. 215; Lamento v. United States, 4 F. (2d) 901; Reynolds v. United States, 48 F. (2d) 762.

The declarations introduced by the government were not of that character. Counsel for the defense minimize their influence by urging the incompetency of the declarant. The case was presented of a husband recreant to his marriage vows, with the opportunity and a powerful motive to perpetrate the homicide. Aside from the declarations of his wife, a conviction was fully justified, and they were in no sense fatal to the rights of the defendant. They were of minor weight as compared with the incriminating circumstances to which we have adverted.

Our conclusion is that the petition for rehearing is not well taken and it is accordingly DENIED.

PHILLIPS, Circuit Judge, dissenting:

For the reasons stated in my former dissent in this case, I am of the opinion that the admission of the testimony of Nurse Brown and Sergeant Gresser as to the statements made by Mrs. Shepard were prejudicial and reversible error. In a case involving the liberty of the defendant for the remainder of his natural life, I am not greatly concerned with technical defects in the errors assigned.

As observed in my former dissent, the statements adverted to above were not declarations manifesting an existing plan, intention, purpose, or design, but a mere narration of a past event; they had no probative value unless the facts stated were true; and they were not admissible under the existing circumstances as proof of the facts stated. Mutual Life Ins. Co. v. Hillmon, 145 U. S. 285, cited in the majority opinion on rehearing is not to the contrary. The court was there dealing, not with the narration of a past event, but with an existing intention, design, or purpose with respect to the future. The statement showed a state of mind at the time it was made, not in the past. In the opinion the court said:

"The existence of a particular intention in a certain person *at a certain time* being a material fact to be proved, evidence that he expressed *that intention at that time* is as direct evidence of the fact, as his own testimony that he then had that intention would be. After his death there can hardly be any other way of proving it; and while he is still alive, his own memory of his state of mind at a former time is no more likely to be clear and true than a bystander's recollection of what he then said, and is less trustworthy than letters written by him at the very time and *under circumstances precluding a suspicion of misrepresentation.*

"The letters in question *were competent, not as narratives of facts communicated to the writer by others, nor yet as proof* that he actually went away from Wichita, but as evidence that, shortly before the time when other evidence tended to show that he went away, he had the intention of going, and of going with Hillmon, which made it more probable both that he did go and that he went with Hillmon, than if there had been no proof of such intention." (Italics mine.)

The majority recognize the qualification that statements showing a state of mind are only admissible when there are present circumstantial guaranties of trustworthiness, but say that was a question to be resolved by the trial court. I may grant the question in the first instance was for the trial court and rested largely in its discretion, but there must have been some basis for its determination that the circumstantial guaranties were present. Here, not only was there no evidence that they were present, but there was much to indicate the contrary.

Mrs. Shepard became ill on May 20, 1929, and died June 15 following. Nurse Brown testified to a statement made on the second day of her illness, and Sergeant Gresser to a statement made on the fourth or fifth day of her illness.

Major Strickler, a medical witness for the defendant, described Mrs. Shepard's condition on the first night of her illness as follows:

"Mrs. Shepard was lying in bed, fully clothed, and was apparently hearing voices. She continually reached

> out, as if picking objects out of the air, brushing them off of her bed. . ."

He diagnosed her condition as polyneurotic alcoholic psychosis,

> "Simply a disorder of the mind characterized by these hallucinations, and the idea that she had been doing certain things which she had not done."

He said that during the first week,

> "She would tell me how she had gone down to Junction City that morning, or sometime during the day, and the various shops she had visited, the various ladies of the post she had conversed with, and how they would come home, and how they had lunch together, and played bridge in the afternoon, and where they had spent the afternoon, all of which was utterly impossible."

He said at the end of the first week,

> "Impairment of vision had improved and it was possible to break through her confusion and get some relevant and coherent answers from her."

Major Hawley, a medical witness for the Government, described Mrs. Shepard's condition on the very day of the statement testified to by Nurse Brown, as follows:

> "Mrs. Shepard was in bed, weak, ill, gave a history as having vomited a great deal the evening before and throughout the night, was still nauseated, the pupils dilated, weak, had a slight mental confusion which could be penetrated, that is, she would answer intelligently if you repeated your question."

Nurse Brown came on the case on the night Mrs. Shepard was taken ill. She testified as follows:

> "When I arrived, Mrs. Shepard's condition was, she was in bed, very ill, and delirious. . . With reference to her mental condition, she gradually cleared up. It was just a few days before it apparently cleared up."

The Government's evidence showed that after the first week Mrs. Shepard's mental condition cleared up. Thus it will be

seen that the statements testified to by Nurse Brown and Sergeant Gresser were made at a time when Mrs. Shepard was in a state of mental confusion and suffering from loss of memory and hallucinations.

Furthermore, the marital relations between Mrs. Shepard and her husband had become strained. She knew that she had lost the affection of her husband. The statements may have been prompted by a spirit of revenge.

> "Heaven has no rage like love to hatred turned,
> Nor hell a fury like a woman scorned."

Because of these facts and for the additional reasons stated in my former dissent, it appears to me that the conclusion is unavoidable that, not only were there no circumstantial guaranties of trustworthiness surrounding the statements, but they were made under conditions that cast grave doubt on their reliability.

The majority say the same is true of the statements introduced by the defendant, inferring, I assume, that they too were made when Mrs. Shepard's mental condition was abnormal. Such is not the record. Of the statements introduced by the defense, six were made prior to her last illness and four during such illness. Of the four made during such illness, two were made in the latter part thereof, when her mental condition had been restored to normal, and two during the early part thereof, when she was abnormal mentally.

Recreant though the defendant may have been to his marriage vows, and much as he may deserve censure therefor, he is here being tried for the crime of murder in the first degree. The evidence of his guilt of that crime is far from conclusive. That issue should be determined by a jury, after a fair trial upon competent evidence, and not by this court.

I cannot agree that the statements testified to by Nurse Brown and Sergeant Gresser were not fatal to the defendant's rights. The evidence of these statements, hearsay though it was, came to the jury with all the impressive awe of a voice from the grave. A deceased wife was permitted to enter the court room and point the finger of accusation at her living husband charged with her murder. That was the drama acted in front of a jury—a drama that might have been founded on

the imagination of a disordered brain or on a desire for revenge, rather than on facts. Present, no oath, no test cross-examination, no sense of impending death, no circumstances of res gestae impelling the declaration, no circumstantial guaranties of trustworthiness; these statements were mere declarations of past events, and the evidence thereof was hearsay, erroneous, and prejudicial, and should have been rejected.

It is my opinion that the petition for rehearing should have been granted, and I respectfully dissent from the denial thereof.

(Order)

Thirty-eighth Day, January Term, Wednesday, April 5th, A. D. 1933.

Before Honorable Robert E. Lewis and Honorable Orie L. Phillips, Circuit Judges.

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied,

---

Petition of Charles A. Shepard for an order withholding the mandate and staying the execution and enforcement of the judgment of the United States District Court for the District of Kansas to enable said appellant to apply for and obtain a writ of certiorari or appeal to the United States Supreme Court.

To the Honorable Judges of the United States Circuit Court of Appeals for the Tenth Circuit:

Your petitioner, Charles A. Shepard, appellant above named, respectfully moves the Court to enter an order withholding the mandate in this case and staying the execution and enforcement of the judgment of the United States District Court for the District of Kansas, rendered in the above cause on the third day of February, 1931, because it is the bona fide intention of the appellant to make proper application to the Supreme Court of the United States for a writ of certiorari in

this case or to perfect an appeal to said Court within the next ninety days.

In support whereof, appellant attaches the professional statement of his counsel, Harry W. Colmery of Topeka, Kansas, and C. L. Kagey, of Wichita, Kansas.

HARRY W. COLMERY,
C. L. KAGEY,
Counsel for the Appellant.

Dated: April 11th, 1933.

Certificate.

The undersigned, Harry W. Colmery and C. L. Kagey, each for himself, hereby certifies that it is the bona fide intention of the appellant, Charles A. Shepard, to remove this case to the Supreme Court of the United States by appeal, or to make application to said Court for a writ of certiorari, or do both, as he may be advised, within the next ninety days, and that each of us believes there is merit in his case and that the judgment of the United States Circuit Court of Appeals for the Tenth Circuit ought to be reversed by the Supreme Court of the United States for the reasons which have been urged in this Court on behalf of the appellant, both in the main case and in the petition for rehearing, and as set out in the dissenting opinions of Judge Phillips of this Court.

HARRY W. COLMERY,
C. L. KAGEY,
Counsel for the Appellant.

Dated: April 11th, 1933.

Filed April 10, 1933.

Order.

First Day, April Term, Monday, April 10th, A. D. 1933.

Before Honorable John H. Cotteral, Honorable Orie L. Phillips and Honorable George T. McDermott, Circuit Judges.

This cause came on to be heard on the motion of appellant for a stay of the mandate herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that no mandate of this court issue herein for a period of thirty days from this day; that within ten days from this day said appellant file with the clerk of this court a bond in the sum of $500.00 with good and sufficient surety, to be approved by a judge of this court, that if said appellant fails to make application for a writ of certiorari from the Supreme Court of the United States within the period hereby allotted therefor or fails to obtain an order granting an application or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the appellee may sustain by reason of this stay; and that, if within said period of thirty days there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, with proof of service thereof under Section 3 of Rule 38 of the Supreme Court, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

Recognizance for Appeal.

Whereas, on Monday, April 10, 1933, an order was entered by this court in the above cause wherein there was provided that no mandate should issue for a period of thirty days from said date, provided the appellant within ten days from said date should file with the clerk of this court a bond in the sum of $500.00, with good and sufficient surety, to be approved by a judge of this court, conditioned that if said appellant fails to make application for a writ of certiorari from the Supreme Court of the United States within the period thereby allotted or fails to obtain an order granting an application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the appellee may sustain by reason of said stay.

Now, therefore, we, the undersigned citizens of the United States and of the State of Colorado do hereby undertake and bind ourselves to the United States of America in the penal sum of $500.00, good and lawful money of the United States. If appellant shall fully comply with the terms of the order

hereinbefore referred to, this obligation to be void, otherwise to be and remain in full force and effect.

Witness our hands this 14 day of April, 1933.

CHARLES A. SHEPARD,
Principal.

JOHN J. HURLEY,
LAWRENCE F. HOWBERT,
Sureties.

State of Colorado, County of Adams—ss.

John J. Hurley and Lawrence F. Howbert, sureties on the above undertaking, do hereby solemnly swear that each of us is worth the sum of $1000.00 over and above his liabilities, debts and exemptions. A schedule of our property showing the amount and value of same, aggregating the sum of $1000.00, hereto attached, and said statement is true and correct.

And, further affiant saith not.

JOHN J. HURLEY,
LAWRENCE F. HOWBERT.

Subscribed and sworn to before me this 14 day of April, 1933.

(Notarial Seal) CHARLES F. HOLZER, Notary Public.

My commission expires Feb. 17, 1935.

Approved this 18th day of April, A. D. 1933.

ORIE L. PHILLIPS, Circuit Judge.

State of Colorado, County of Adams—ss.

I, John J. Hurley, do hereby certify that I am the owner of the following property, situate in the City of Aurora, County of Adams, Colorado, as follows: No. ½ block 179 and all of block 180, Boston Heights, 2nd filing, assessed value $2750.00 valued at Five thousand 00/ dollars.

No incumbrance on said property.

JOHN J. HURLEY.

Subscribed and sworn to before me this 14th day of April, 1933.

(Notarial Seal) CHARLES F. HOLZER, Notary Public.

My commission expires Feb. 17, 1935.

State of Colorado, County of Adams—ss.

I, Lawrence F. Howbert, of the City and County of Denver, do hereby certify that I am the owner of the following property, known as 1252 York Street, Denver, Colorado, and described as follows:— Lot 36 & No. 7.36 ft. of 35 So. 17.64 ft. of 37; Block 46; E. F. Hallack's Second Addition & 35, 36, & So. 17.64' of 37; Block 1, Wyman's Third Addition, Denver, Colorado.

Assessed valuation $4010.00; valued at $10,000.00, subject to a first mortgage of $2500.00, which has been reduced by monthly payments.

LAWRENCE F. HOWBERT.

Subscribed and sworn to before me this 14th day of April, 1933.

(Notarial Seal) CHARLES F. HOLZER, Notary Public.

(My commission expires Feb. 17, 1935.)

Filed April 18, 1933. Albert Trego, Clerk.

(Clerk's Certificate.)

United States Circuit Court of Appeals, Tenth Circuit.

I, Albert Trego, Clerk of the United States Circuit Court of Appeals for the Tenth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Kansas, as prepared and printed under the rules of the United States Circuit Court of Appeals for the Tenth Circuit, under the supervision of its clerk, and full, true and complete copies of the following described pleadings, record entries and proceedings, including the opinions (except full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States), had and filed in the United States Circuit Court of Appeals for the Tenth Circuit in a certain cause in said Circuit Court of Appeals wherein Charles A. Shepard was appellant and The United States of America was appellee, No. 564:

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Order of Submission,

Opinion,

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Petition for Rehearing,

Opinion on Petition for Rehearing,

Order denying Petition for Rehearing,

Motion for stay of mandate,

Order granting motion for stay of mandate,

Recognizance for appeal,

as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Tenth Circuit, at office in the City of Denver, Colorado, this 29th day of April, A. D. 1933.

ALBERT TREGO,
Clerk of the United States Circuit Court of Appeals, Tenth Circuit.

(Seal, U. S. Circuit Court of Appeals, Tenth Circuit)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 29, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted, and the case is assigned for argument on Monday, October 9 next, after the cases heretofore assigned for that day.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILED
MAY 8 1933
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. [redacted] 50

CHARLES A. SHEPARD, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

HARRY W. COLMERY,
BALFOUR S. JEFFREY,
C. L. KAGEY,
L. M. KAGEY,
Counsel for Petitioner.

DORAN, KLINE, COLMER & COSGROVE,
KAGEY & BLACK,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 942

CHARLES A. SHEPARD, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of Charles A. Shepard respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

Charles A. Shepard, petitioner, was convicted of the murder of his wife, Zenana Shepard (R. 26) and sentenced to life imprisonment by the United States District Court, for the District of Kansas, First Division (R. 30). The indictment, returned on April 18, 1930, charged the first degree murder of Zenana Shepard,

by poisoning, on the United States military reservation at Fort Riley, Kansas (R. 1). At the December, 1930, term, the jury returned a verdict of "* * * guilty as charged in the indictment, without capital punishment" (R. 26). On appeal to the United States Circuit Court of Appeals for the 10th Circuit, this judgment was affirmed on January 9, 1933, Judge Phillips dissenting (R. 594). Petition for rehearing was denied April 5, 1933, Judge Phillips again dissenting (R. 635).

During the course of the trial, Clara Brown, the nurse who had attendent the decedent during her illness, was permitted to testify, in answer to questions by the court in rebuttal, that the deceased stated to her, "She said, Doctor Shepard has poisoned me" (R. 524-7). After a motion to strike by counsel for the petitioner, the United States Attorney withdrew that evidence (R. 527). The witness was recalled the next day, her testimony repeated, and submitted to the jury over the objection and exception of counsel for the petitioner (R. 562-6). After undertaking to lay a foundation for a dying declaration, by having the witness state that, on the second day of her illness (25 days before her death), Mrs. Shepard said, "She was not going to get well; she was going to die;" the witness testified that she said that, "She was being poisoned" and "Dr. Shepard has poisoned me" (R. 562-5). At the first offering the prosecution suggested res gestæ as the theory of admissibility (R. 526). At the second offering the record shows indisputably that the testimony was offered and received as a dying declaration (R. 562-4). The jury was not

admonished as to any restricted use or application of the testimony (R. 565-6).

The testimony of many witnesses, both for the prosecution and the petitioner, most of whom were medical men who had observed and attended the deceased during her illness, and especially at about the time of her alleged declarations, showed her to be ill and delirious (R. 137-9), in a state of collapse, and suffering a mental confusion (R. 63); that she would apparently hear voices when no one had spoken, continually reach out to pick objects from the air and brush them off her bed (R. 137-354); would talk of having been to places and having visited with people which were utterly impossible in fact (R. 356), and suffering many hallucinations (R. 354); that she was blind to the extent she did not recognize people (R. 56) or her fingers in front of her (R. 354).

The Circuit Court of Appeals held that the testimonies of Nurse Brown and Sergeant Gresser were not admissible as dying declarations or for the truth of the matter asserted and contained in them, because the guaranties of trustworthiness were lacking, and the declarant had no belief of immediate and impending death, and because the statement to Sergeant Gresser was not one of fact but opinion (R. 598). However, it held that this testimony was competent to refute the defendant's theory of suicide, as circumstantial evidence showing the state of mind of the deceased (R. 598; *Shepard* v. *United States*, 62 F. (2d) 683, 685)—a theory advanced for the first time in the Government's brief on appeal. In denying the petition for rehearing the majority also held that this

evidence was not serious and fatal to the petitioner's rights (R. 637-8).

The majority conceded the contention that it was error to admit evidence held competent for only a restricted purpose without instructing the jury as to that purpose, but held that such error was waived because trial counsel had not requested such an instruction, and any objection which petitioner may have had to the instructions of the trial court had been waived because his counsel at the trial accepted them as satisfactory (R. 599).

Judge Phillips dissented on the grounds that the evidence was neither admissible as dying declarations as evidence of the facts stated (R. 602), nor to show a state of mind for the purpose of refuting other declarations showing a state of mind disposed to suicide; that they were narratives of past events whose sole probative value was as evidence of the fact stated (R. 603-4); and were not surrounded by circumstantial guaranties of trustworthiness, but on the contrary were accompanied by circumstances which cast suspicion on their reliability (R. 638-41). Judge Phillips held further, that if the declarations were admissible for only a restricted purpose to show a state of mind, and not for truth of the facts stated, it was the duty of the trial court to limit their use by the jury, by an instruction given to them (R. 604), and that failure to do so was positive error, in that the jury was permitted to consider the evidence as a proof of a fact of which it was no proof (R. 607); that a request for such an instruction would have been futile because in-

consistent with the theory under which the declarations were offered and received (R. 605); and that even so the petitioner should not be "waived" into the penitentiary by failures of counsel (R. 605).

A few days before the trial, at Kansas City, Kansas, a newspaper article concerning the case was published in the *Kansas City* (Missouri) *Star* (R. 38). There was no showing that the petitioner either wrote or inspired the publication of the story. In selecting the jury, the trial court, without examination to find out whether they had formed an opinion about the case, disqualified, summarily, 7 members of the panel who had read the article (R. 45-93) and 3 who were examined but had formed no opinion (R. 38-44). One of these 3 was challenged for cause by the prosecution (R. 44). The petitioner exhausted all of his peremptory challenges before a jury was selected (R. 49). Counsel for the petitioner excepted and objected to the procedure and moved to quash the panel and discharge the jury (R. 50). The Circuit Court of Appeals held there was no error because the court had the power to pass on the qualifications, and there was no error unless there was an abuse of discretion, and that the petitioner had no ground of complaint because he was tried before an impartial jury (R. 595).

In his opening comment on the evidence to the jury the court, in speaking of the petitioner's life record, said, "From that time on until the date *this murder* is alleged to have been committed * * *." As the crime to be proved was "murder" the court, at the outset, definitely indicated that he was satisfied that

that which the Government was required to prove, that is, the murder of Zenana Shepard, had been accomplished to his satisfaction.

In commenting upon the evidence to the jury, the trial court discussed the autopsy which was performed, and, that from the findings, certain witnesses estimated that the viscera contained from 2½ to 3 grains of mercury (R. 584). The Government's theory was death by mercurial poisoning. Although there was abundant evidence that Mrs. Shepard was disgusted with life, had stated that she intended to kill herself, did not want to live, expected to die soon, that she took morphine and drank alcoholic liquor excessively, and may have taken bichlorid of mercury with suicidal intent (R. 346-7, 354-7, 383, 386-7, 394, 405-7, 411-4, 470-4, 476-8, 483, 485-6, 488-9, 492-3, 497-9, 515-6); that death might have been due to Vincent's angina infection definitely diagnosed (R. 361-2, 370-1, 373); that both Government and defense witnesses testified that the mercury in the viscera could have been absorbed through the mouth wall through treatment of Vincent's angina (R. 371, 391, 398, 132, 507), and her death caused in that manner (R. 400, 508), the court at the outset said to the jury, "There then arises these two questions: Did this woman die of mercurial poisoning? and, secondly, Did the defendant, Charles A. Shepard, administer the mercury to her as charged in the indictment?"

Thereafter the court outlined to the jury in great detail the testimony of the Government's witnesses to show that death was caused by mercurial poisoning

(R. 585-6). And although there was abundant evidence to show that attending physicians diagnosed her condition as *polyneurotic alcoholic psychosis* (R. 354-6) that her condition was typically alcoholic and not due to mercury poisoning (R. 358-9); that there was no evidence of mercury mouth (R. 358); that army men of broad experience in the treatment of Vincent's angina diagnosed her case as such and prescribed a mouth wash of mercuric chloride and treated it over a period of two weeks up to the day of her death; and that condition gradually improved, but had the mouth been a mercury mouth, would have got worse under mercury treatment (R. 369, 370-6); that microscopic smears were taken from the ulcers in the intestines and showed both *spirochete* and *bacillus fusiformis* germs of Vincent's angina (R. 361, 372-3); that people die from Vincent's angina (R. 373, 361-2); and that acute *nephritis* or congestion of the urine, characteristic of mercury poisoning, were not present (R. 88, 106, 131, 511); that Mrs. Shepard was disgusted with life and stated she had intended to kill herself, did not want to live, expected to die soon, and took morphine and drank alcoholic liquors excessively (Reference supra)—*the court passed this all over with the cursory statement that,* "There was evidence tending to show that the deceased, Zenana Shepard, had made threats of suicide and statements to the effect she wanted to die; also evidence as you will recall, tending to show she might have been poisoned by the mouth-wash. Such evidence is competent for the purpose of showing she might have taken poison to end her

life or that the mouthwash might have caused her death" (R. 590). And although there was abundant evidence by both Government and defense witnesses, including eminent Government pathologists, that Mrs. Shepard could have absorbed enough mercury from the mouthwash to have caused her death (R. 132, 371, 391, 398, 507), and that death was due to that cause (R. 400, 508); that an army physician of broad experience in the treatment of Vincent's angina prescribed mercuric chloride, personally administered the mouth wash once and sometimes twice a day for over a period of two weeks, administering 21 ounces of it which would have contained approximately 2 grains of mercury (R. 370); that 4 or 5 bottles of the solution were used altogether (R. 570, 569); yet the court, in describing the mercury solution administered as a mouth wash, *failed to state that it contained mercury* (R. 587), *and out of all this testimony so vital to the defense baldly stated that,* "There has been testimony introduced that the deceased might have absorbed by the use of this mouth wash, enough mercury to account for the amount of mercury found in the viscera of the deceased" (R. 587).

And although the court stated that in order to show that the petitioner administered the mercury, that as Officer of the Day he had access to the dispensary where poisons were kept, got empty capsules, had 3 prescriptions for bichlorid of mercury filled (R. 588-9), he entirely omitted to state that there was testimony by others to the effect that there was nothing unusual about the petitioner's getting either mercury or capsules or having it in his possession, that the peti-

tioner or any other doctor could have gone to the dispensary and got mercury and nothing would have been said about it; that doctors carry a kit with a container for mercury tablets; that mercury was used a great deal as a disinfectant and for ear trouble; that Major Dye had written prescriptions for bichlorid of mercury and alcohol, had them filled, and carried them on his table as stock remedies for the treatment of running ears and measles cases and that he and Major Shepard had discussed this as the treatment to use (R. 123-4, 362, 420, 431). The Circuit Court of Appeals brushed aside the alleged errors in the one-sided and unfavorable comment on the evidence by stating that the instructions had been accepted as satisfactory by defendant's counsel (R. 600).

At the close of all the evidence the defendant presented its motion for a directed verdict, which was overruled, and exception allowed (R. 574).

B.

Reasons Relied on for the Allowance of the Writ.

In an action in which petitioner was tried and convicted for the murder of his wife, and sentenced to life imprisonment, the Circuit Court of Appeals erred:

1. In approving the admission of hearsay declarations to prove the state of mind of the deceased to rebut suicidal intent, which were not admissible as either dying declarations or part of the *res gestæ* to show the truth asserted, did not show a present existing state of mind but were narratives of past events and which were not made under circumstances free from

suspicion and misrepresentation and were not surrounded by substantial guaranties of trustworthiness;

2. In holding that evidence, not competent for a purpose obvious to laymen, but which is admissible for the narrow and restricted purpose of showing a state of mind, may be submitted to a jury without any limitation or direction from the trial court as to its use and applicability, and the failure of counsel to request an instruction for that purpose waives the defendant's rights in that regard;

3. In approving one-sided and unfavorable and prejudicial comments on the evidence by the trial court, and in holding that the defendant's rights to object were waived by counsel who stated that the instructions were satisfactory, thus placing the duty of counsel "to be fair to the court" which has a duty to perform, above and paramount to "fairness to the accused" who has rights to be protected, in the interest of securing to him a fair and impartial trial;

4. In approving the disqualification of jurors who had read newspaper accounts of the case but who had formed no opinion and without examining them to ascertain whether they had any opinion, the defendant having exhausted all his peremptory challenges, and in finding that the selection of a jury in such a manner did not work a serious prejudice to the petitioner or violate his rights under Sec. 287 of the Judicial Code (28 U. S. C. A. Sec. 424) or the rights of the petitioner to an impartial jury under the 6th Amendment to the Constitution of the United States;

5. And that the decision of the Circuit Court of Appeals illustrates how the course of judicial decisions in the Federal and state courts applying and interpreting the decision of this Court in *Mutual Life Ins. Co.* v. *Hillmon*, 145 U. S. 285, 12 S. Ct. 909, 36 L. Ed. 706, has lead to so much confusion and uncertainty that the evidential doctrine stated therein has become so unintelligible certainly to the layman, probably to lawyers, and possibly now and then even to judges, that this Court should interpret and declare the applicability of the principles of that case to avoid conflict in, and secure a uniformity of decisions in the Federal and state courts;

6. And because said decision and judgment of the Circuit Court of Appeals decides questions of substance each of which complained of is decided in a way probably not in accord with the applicable decisions of this Court, and which have not been, but should be, settled by this Court, and in such a way as to depart so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

C.

Questions Presented for Review by the Court.

The questions presented for review by the Court are:

1. Did the Circuit Court of Appeals err in finding and holding that the declarations of deceased, as reported by Nurse Brown and Sergeant Gresser, were admissible to show state of mind?

2. Did the Circuit Court of Appeals err in finding and holding that such evidence, not competent for a purpose most obvious to laymen, but admissible for a narrow and restricted consideration, may be submitted to the jury without any direction or limitation by the court as to its use and application?

3. Did the Circuit Court of Appeals err in finding and holding that in a case where the petitioner was on trial for life or liberty for life, the failure of counsel to request an instruction to limit the application and use of testimony admitted for a restricted purpose, and his statement that the court's instructions were satisfactory, waived the rights of the accused which would otherwise have been protected, and any right he may have had to have a fair trial assured him by fair and impartial comment on the evidence by the court?

4. Did the Circuit Court of Appeals err in finding and holding that there was no error in the trial court's disqualifying jurors who had not formed an opinion, or without examining them to ascertain whether they had formed an opinion, where the defendant had exhausted all of his peremptory challenges and under such circumstances did the accused have a fair and impartial trial?

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding that Court to certify and to send to this Court, for its review and determination, on a day cer-

tain to be therein named, a full and complete transcript of the record of all proceedings in the case numbered and entitled on its docket No. 564, *Charles A. Shepard,* appellant, v. *United States of America,* appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just. And your petitioner will forever pray.

CHARLES A. SHEPARD,
By HARRY W. COLMERY,
BALFOUR S. JEFFREY,
C. L. KAGEY,
L. M. KAGEY,
Counsel for Petitioner.

DORAN, KLINE, COLMER & COSGROVE,
KAGEY & BLACK,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Court Below.

The opinion of the United States Circuit Court of Appeals (R. 594) sought to be reviewed is reported in 62 Fed. (2d) 683. The opinion of that court denying a rehearing (R. 635) is not yet reported, but was filed by the Circuit Court of Appeals for the Tenth Circuit with the clerk of that court on April 5, 1933.

II.

Jurisdiction.

Judgment was rendered in the United States District Court, for the District of Kansas, on February 3, 1931 (R. 30), and affirmed by the Circuit Court of Appeals, January 9, 1932 (R. 607), and rehearing denied April 5, 1933 (R. 642). On April 10, 1933, the mandate was ordered withheld and execution of judgment stayed for thirty days to permit filing of this petition (R. 643). The jurisdiction of this Court is invoked under Sec. 240 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938(a) (28 U. S. C. A. 347). The petitioner was tried under an indictment charging first degree murder committed on the United States military reservation at Fort Riley, Kansas (R. 1).

III.

Statement of the Case.

The facts material to the matter involved and the issues raised in the Circuit Court of Appeals have already been stated in the petition (Point A, pp. 1-9), which is hereby adopted and made a part of this brief.

IV.

Specification of Errors.

1. The Circuit Court of Appeals erred in finding and holding that the declarations of deceased, as reported by Nurse Brown and Sergent Gresser, were admissible to show state of mind;

2. The Circuit Court of Appeals erred in finding and holding that such evidence, not competent for a purpose most obvious to laymen, but admissible for a narrow and restricted consideration, may be submitted to the jury without any direction or limitation by the court as to its use and application;

3. The Circuit Court of Appeals erred in finding and holding that in a case where the petitioner was on trial for life, or liberty for life, the failure of counsel to request an instruction to limit the application and use of testimony admitted for a restricted purpose, and his statement that the court's instructions were satisfactory, waived the rights of the accused which would otherwise have been protected, and any right he may have had to have a fair trial assured him by fair and impartial comment on the evidence by the court;

4. The Circuit Court of Appeals erred in finding and holding that there was no error in the trial court's disqualifying jurors who had not formed an opinion, or without examining them to ascertain whether they had formed an opinion, where the defendant had exhausted all of his peremptory challenges, and that under such circumstances the accused had had a fair and impartial trial.

V.

ARGUMENT.

A.

The Circuit Court of Appeals erred in finding and holding that the declarations of deceased, as reported by Nurse Brown and Sergeant Gresser, were admissible to show state of mind.

The testimony of Nurse Brown and Sergeant Gresser has been summarized in the foregoing petition (Point A, pp. 2-3; complete at R. 562, 539). This testimony was not admissible for any purpose because:

1. THE DECLARATIONS ARE NOT ADMISSIBLE FOR THE TRUTH OF THE MATTER ASSERTED.

(*a*) *The testimony was not admissible as a dying declaration or as part of the res gestæ.*

The evidence was undoubtedly offered and received by the trial court as a dying declaration for the truth of the matter asserted in the statement by the deceased (R. 562-4). On authority of *Mattox* v. *United States,* 146 U. S. 140, the Circuit Court of Appeals

correctly held the testimony inadmissible as lacking the substantial guaranties of trustworthiness for the oath and cross-examination required by a belief of imminent death. The testimony of Sergeant Gresser was further held inadmissible as opinion, *Shepard* v. *United States,* 62 Fed (2d) 683, at 685; R. 598).

The court did not consider the evidence admissible as part of the *res gestæ.* The statement was not made as an integral part of the act related but was made subsequent to that act. Neither was it made during a startling and sudden event by a declarant with knowledge and laboring under such a stress of excitement caused by the event as to make the utterance spontaneous and unreflected.

(*b*) *The testimony was not admissible to show condition of mind as truth of the matter asserted.*

The exact theory upon which the evidence was held admissible by the court is difficult to determine. The opinion written by Judge Cotteral makes only the bare assertion that the evidence was competent to show a state of mind as rebuttal to the defense theory of suicide (R. 598). Condition of mind may be revealed in two manners: *First,* by direct declaration of the state of mind. *Second,* by statements not directly declaring state of mind, but which provide circumstantial evidence giving rise to an indirect inference of the state of mind, the same as any external act may give rise to an inference which describes the mental condition. The former is hearsay; the latter is not.

The majority opinion shows that it relies entirely upon *Mutual Life Ins. Co.* v. *Hillmon,* 145 U. S. 285,

12 S. Ct. 909, 36 L. Ed. 706; *Commonwealth* v. *Trefethen,* 157 Mass. 180, 31 N. E. 961; and 3 *Wigmore on Ev.,* Sec. 1725, wherein Professor Wigmore discusses a direct statement of plan, design, or intention as an exception to the hearsay rule as a statement of mental condition. These cases are totally inapplicable in doctrine or facts. In the *Hillmon* case, the defendant offered letters and testimony of the contents of letters written by Walters, from Wichita, to his betrothed and to his parents in Iowa, expressing an intention to leave Wichita, with Hillmon. This Court held the evidence competent for a restricted purpose, not to show that Walters "actually went away from Wichita, but as evidence that, shortly before the time when other evidence tended to show that he went away, he had the intention of going, and of going with Hillmon" (l. c. 296). *Commonwealth* v. *Trafethen* arose from the trial for murder of a woman by an accused seducer. The defense of suicide was set up and the declaration of the young woman made the day before her death that she was going to drown herself was held to be admissible. In *Hunter* v. *State,* 40 N. J. L. 495, statements of the deceased, that he was going to Camden with the accused on business, were admitted.

Professor Wigmore has grouped those cases under an exception to the hearsay rule which he calls statements of mental condition (*Wigmore on Ev.* (2d ed.), Sec. 1725, Vol. 3, p. 696). He says of the above cases and of that hearsay exception, "The only limitations as to the use of such statements (assuming the fact of the design to be relevant) are those suggested by the general principle of this exception, namely, the

statements must be of a *present existing state of mind*, and must appear to have been made in a natural manner and not under circumstances of suspicion."

The cases bear out that limitation. The difference between those cases above, relied upon by the court, and the case at bar is manifest. In those cases there is a direct statement of intention to do a future act, and the ultimate issue to be determined is whether there was a future act in accord with that intention. The statements were made at a time prior to the act in question and were offered and admitted to prove the facts contained in the declaration. In the *Hillmon case,* a statement of expectation to go on a trip was offered to show that he intended to go on a trip. But here, the declaration that "Dr. Shepard has poisoned me" is not a direct statement of the state of the deceased's mind. If it throws any light on the mind of the declarant, it is only by way of circumstances, giving rise to an indirect inference, and is not by way of the truth of the matter asserted. It is also a statement made subsequent and not prior to the act in question.

Taking the statement as a truth for which it must be considered to come within any hearsay exception, it states but one fact, and is only a statement of a previous occurrence, a fact external to the mind, and a narrative of a past event. The declaration itself shows nothing concerning the mind of the declarant. It does not purport to describe it. To be admissible it must be a statement of present existing state of mind, and the narrative of a past event cannot be said to logically show a present existing condition of mind, which is an absolute requisite to come within this ex-

ception of the hearsay rule (*Wigmore on Ev.* (2d. Ed.), Sec. 1725).

The only two exceptions which might be applicable in any manner are dying declarations and *res gestæ*, both of which were denied by the court (R. 598-9).

Counsel for petitioner have been unable to find any authorities considering the exact situation here in light of a hearsay exception. To say that this testimony was admissible to show a condition of mind would require finding that a declaration, not a direct statement of mental condition, but only an utterance of a past event, may be shown to prove a present mental condition, which alone is of no value, unless the step from mental belief to the very past action or non-action recited in the statement, may be inferred. If the evidence is not directly admissible to show the truth of that which it recites, it certainly could not be admissible to prove that very thing by the indirect method of allowing it to show a present state of mind from which a past event may be inferred.

There is no justification in rule or reason for admitting this evidence for the truth of the matter asserted under the hearsay exception of statements of a mental condition. To admit the evidence under the rule of the *Hillmon case* carries that case far beyond its ruling and doctrine.

However, if this Court should believe that there is justification for admitting this testimony as hearsay, the petitioner respectfully calls attention to the additional requirement that there be some circumstantial guaranties of trustworthiness, and to review of the evidence concerning the surrounding circumstances

under which the declarations were made in this case (Petition, p. 2).

The court has ruled the evidence not admissible to show the event happened, and that it is competent only to show a state of mind inconsistent with suicide. The only logical meaning of that ruling and of the opinion is that the Circuit Court of Appeals considered it proper as circumstantial evidence of a state of mind.

2. THE TESTIMONY WAS NOT ADMISSIBLE TO INDICATE CIRCUMSTANTIALLY THE DECLARANT'S STATE OF MIND.

The declaration of Mrs. Shepard was not a direct statement of her belief or state of mind, but only the basis from which the state of her mind might be inferred.

Because the evidence was introduced on rebuttal by the prosecution does not avoid the application of ordinary and established principles of law. Rebuttal evidence must be competent and satisfy the same rules of evidence as testimony offered on case in chief. The relevancy may be different; the rules of law are the same.

The court held that the declaration was not admitted for the truth, but only as revealing the state of mind at the time the statement was made, regardless of the truth or falsity of the facts contained in the statement. Professor Wigmore has stated the proposition, as follows: "* * * the utterance is not used for the sake of inducing belief in any assertion it may contain. The assertion, if in form there is one, is to be disregarded, and the indirect inference alone

regarded'' (3 Wigmore on Ev. (2d. Ed.), Sec. 1790, p. 822). It is thus free from the hearsay rule. The important issue is not whether the act recited happened, but whether the statement sheds any reliable light on the state of mind of the declarant. But however relevant the state of mind may be and how definite the statement seems to picture a particular condition of mind, it must be made under circumstances free from suspicion or misrepresentation. *Mutual Life Ins. Co.* v. *Hillmon, supra; Commonwealth* v. *Trefethen, supra; State* v. *Hayward,* 62 Minn. 474, 65 N. W. 63.

Even though an extra judicial statement is not offerred for the truth of the facts contained in it, the declaration must be surrounded with circumstances which show a freedom from suspicion that the statement did not represent the condition of mind of the declarant at the time it is made. The real witness, the declarant, is not on the witness stand, on oath, or subject to cross-examination, which are ordinary safeguards.

In the *Hillmon case,* Mr. Justice Gray was very careful to point out that the letters were written by one Walters under circumstances precluding a suspicion of misrepresentation. That case was immediately followed by Chief Justice Field in the *Trefethen case.*

In *State* v. *Hayward, supra,* Chief Justice Start, of the Minneapolis Supreme Court, states the rule to be, ''That when the question is whether a person did a certain act, his declarations, oral or written, made prior to and about the time he is alleged to have done an act, to the effect that he intended to do it, are ad-

missible as original evidence, if made under circumstances precluding any suspicion or misrepresentation" (l. c. 497). Professor Wigmore quotes that statement by Mr. Justice Start with approval in Sec. 1726, Vol. 3, p. 702, *Wigmore, Evi.* (2d Ed).

The only protection from the danger of a statement that would not show the true condition of mind lies in that rule that requires that the circumstances surrounding the declarations be free from circumstances of misstatement. Misstatement includes expressions either intentionally false, or false because of the declarant's inability to express himself accurately. Whether such circumstances are present is a preliminary matter for the court to decide before the evidence may be submitted to the jury. It is not the function of the jury to decide that question. *Commonwealth* v. *Robinson,* 146 Mass. 571; *State* v. *Wilks,* 278 Mo. 48.

The court held here there was not such a guarantee of trustworthiness in belief of speedy death as to justify admission of the evidence as dying declarations. Neither is there a guarantee of trustworthiness from the circumstances in which the statements were made. Evidence is ample that describes the conditions at or about the time the statements were made. It is condensed and set out by reference at pp. 2-3 of the petition, and shows clearly that at the time the declarations were made Mrs. Shepard could not perceive the state of her own mind, and the circumstances surrounding their making, not only were not free from suspicion, but cast grave doubt on their reliability. And fur-

thermore, as stated by Judge Phillips, "The marital relations between Mrs. Shepard and her husband had become strained. She knew that she had lost the affection of her husband. The statements may have been prompted by a spirit of revenge" (R. 641).

A further fact which casts suspicion and points to the unreliability of the declarations, is that Clara Brown, the nurse who attended Mrs. Shepard, although a registered nurse, attending a case the exact nature of which was baffling three or four doctors, did not report the statement purported to have been made by Mrs. Shepard, that she was poisoned, and kept that information to herself for 25 days, and until after Mrs. Shepard's death, although the revealing of it would have provided the clue for proper medical treatment. Apparently Nurse Brown considered it an irresponsible statement, bedroom chatter, unworthy of consideration and reporting (R. 566-7).

B.

The Circuit Court of Appeals erred in finding and holding that such evidence, not competent for a purpose most obvious to laymen, but admissible for a narrow and restricted consideration, may be submitted to the jury without any direction or limitation by the court as to its use and application.

If the evidence were admissible only to show state of mind, it was for a restricted purpose, and the trial court had a duty to instruct the jury as to its proper use and application. In *Minner* v. *United States* (C. C. A. 10) 57 F. (2d) 506, at page 510, it was said:

> "We conclude that Nelson's and Norton's testimony was admissible to show the latter's acquaintance and association with Minner, and on the question of Minner's intent. However, since the evidence in the case was long and involved, the court should have carefully directed the jury to consider such testimony for such purposes only both at the time of its admission and in the general charge."

The majority opinion approves the decision in *Minner* v. *United States* on the ground that the evidence was long and involved (R. 599). The Minner case had 253 pages in the original record; the Shepard case, 588. The Minner case had 330 pages in the printed record; the Shepard case, 592. The Minner case had 29 witnesses; the Shepard case, 79. The Minner case took 3 days for trial; the Shepard case, 18 days (R. 607, 626).

In *Maines* v. *State*, 23 Tex. App. 576, 5 S. W. 123, it was said:

> "The general rule is 'that whenever extraneous matter is admitted in evidence for a specific purpose, incidental to, but which is not admissible directly to prove, the main issue, and which might tend, if not explained, to exercise a strong, undue, or improper influence upon the jury as to the main issue, injurious and prejudicial to the rights of a party; then it becomes the imperative duty of the court in its charge to so limit and restrict it as that such unwarranted results cannot ensue; and a failure to do so will be radical and revisable error, even though the charge be not excepted to" (l. c. 126).

To the same effect see:

State v. *Lavin,* 80 Ia. 555, 46 N. W. 553;
State v. *Collins,* 127 N. C. 667, 28 S. E. 520;
Thornley v. *State,* 36 Tex. Crim. 118, 35 S. W. 981;
Barnett v. *State,* 104 Ohio St. 298, 135 N. E. 667;
Randall Instructions to Juries, Sec. 300, p. 576.

At page 791, of 14 R. C. L. it is said:

> "But where the evidence is admissible for one purpose only the jury should be instructed that the evidence must be considered only in connection with their consideration of the issue on which it was admissible. * * * it has been held that where evidence is admissible against a defendant on a criminal trial, tending to show the commission of another crime by him, it is the duty of the court, whether requested or not, properly to instruct the jury with reference to the purpose and object of the testimony, where there is danger of a conviction for an offense not charged, or of an unwarranted use of the testimony to the prejudice of the defendant in the case in which he is being tried."

The admission of this evidence to show a state of mind inconsistent with suicide was for a narrow and restricted purpose which is not readily comprehended by laymen. Instruction from the court is necessary to insure proper use of the evidence. Otherwise, rules of evidence are valueless.

Furthermore, the nature of the declaration made it imperative that the trial court instruct concerning the use of the testimony. As it was evidence cast in

testimonial form, just as if the declarant were testifying on the witness stand to the fact recited, the jury would treat it, likely, as a real narrative of the act recited, whereas it is proper, if at all, only as a basis of an inference of intent or state of mind and not for the fact recited. The danger in this situation is more apparent than in cases where the evidence is a direct declaration of intent or state of mind. The jury would readily comprehend it as such and it would not be taken as evidence of an external fact.

Again, the prosecution was attempting to prove the very external fact which the statement recited. It supplied the necessary connection between the crime charged and the petitioner, if taken for the truth of the matter asserted. And again, declarations offered as circumstantial evidence for state of mind must be relevant to the particular issue. On the theory under which the declarations were held proper, the material issue is whether Mrs. Shepard committed suicide. In evidence of this nature, where the harmful effect from facts stated in the declaration is great, the degree of relevancy is important. The process here of connecting the statement with the issue to be determined is complicated. Since there is not a direct statement of state of mind, it is necessary that an inference be drawn from the facts of the declaration to the state of mind; still another inference from the state of mind that she did not in fact commit suicide; another inference that since deceased did not kill herself, there was a murder; and that since there was a murder, it is inferred that the defendant committed it. Thus the relevancy of the particular issue for which this testi-

mony was admitted is so remote from the ultimate issue, that it becomes increasingly important that the jury be made aware of the limited purpose for which the declaration could be used.

Judge Phillips also pointed out that if the declarations have relevancy, they must be considered as a substantive fact of the matter contained in them, which use was held improper by the majority.

These considerations, together with the fact that the petitioner here was charged with a crime of the highest gravity, punishable by death or life imprisonment, and that the evidence was of a serious and fatal nature, made the risk very great, in submitting the evidence to a jury, unlimited and undirected. Proper instruction to the jury is the only protection the petitioner had from improper use of the evidence. *Wigmore on Ev.* (2d Ed.) Sec. 1790, Vol. 3, p. 823. It would seem the duty of the trial court was clear.

C.

The Circuit Court of Appeals erred in finding and holding that in a case where the petitioner was on trial for life, or liberty for life, the failure of counsel to request an instruction to limit the application and use of testimony admitted for a restricted purpose, and his statement that the court's instructions were satisfactory, waived the rights of the accused which would otherwise have been protected, and any right he may have had to have a fair trial assured him by fair and impartial comment on the evidence by the court.

1. THE RIGHT OF PETITIONER TO BE PROTECTED FROM SERIOUS AND PREJUDICIAL ERROR, CAUSED BY FAILURE OF TRIAL COURT TO RESTRICT USE OF TESTIMONY, SHOULD NOT BE WAIVED BY INADVERTENCE OR NEGLECT OF HIS COUNSEL.

But the Circuit Court of Appeals holds the failure of counsel to request an instruction cures the error of no instruction. In the analagous cases, where life and liberty are at stake, this court and other courts have seen fit to notice and relieve from radical error, which is seriously prejudicial to a defendant, although the error was not objected to or excepted to by counsel.

Wiborg v. *United States*, 163 U. S. 632, 16 S. Ct. 1127, 41 L. Ed. 289;

Brasfield v. *United States*, 272 U. S. 448, 47 S. Ct. 135, 71 L. Ed. 345;

Crawford v. *United States*, 212 U. S. 183, 194, 29 S. Ct. 260, 53 L. Ed. 465;

New York Central Railroad Co. v. *Johnson*, 279 U. S. 310, 49 S. Ct. 300, 73 L. Ed. 706;

Weems v. *United States*, 217 U. S. 349, 362, 30 S. Ct. 527, 54 L. Ed. 769;

Reynolds v. *United States* (C. C. A. 10), 48 F. (2d) 762.

Bogileno v. *United States* (C. C. A. 10), 38 F. (2d) 584).

Stassi v. *United States* (C. C. A. 8), 50 F. (2d) 526;

Lamento v. *United States* (C. C. A. 8), 4 F. (2d) 901, 904.

It seems to counsel for petitioner that there is no greater reason for an appellate court correcting errors

in the admission of testimony, where counsel fail to object or except, than for such a court to correct error in instructions given by a trial court when counsel fail to request specific instructions. If a court will notice errors prejudicial in the face of a failure to object and except, it would be even more just not to deny to a defendant proper instructions because of failure of counsel to request them. The court is more than a passive referee with a right and duty to speak only when spoken to, when vital rights are at stake. The exception by which such rights are protected and a just enforcement of the law secured has also been recognized in situations less grave than this:

Skuy v. *United States*, 261 Fed. 316;
McNutt v. *United States*, 267 F. 670 (C. C. A. 8);
Ayres v. *United States*, 58 F. (2d) 607, 609;
Minner v. *United States*, 57 F. (2d) 506.

Judge Phillips puts the issue quite clearly when he says in his dissenting opinion, "That a defendant may be 'waived' into the penitentiary for life is repugnant to my conception of justice" (R. 605). See also, *The Hillmon Case Thirty Years After*, MaGuire, 38 *Harvard Law Review*, at page 718.

In this connection it is most important to note that the declarations were first offered as *res gestae* (R. 526), and then reoffered as dying declarations (R. 562-6). Neither the United States Attorney nor the trial court ever had any idea of introducing them for the limited purpose of showing state of mind. Under such circumstances it would not have availed petitioner anything to have requested an instruction limiting the

use of the testimony, because the request would have been inconsistent with the theory on which it had been offered and admitted. May the Government, some 18 months later, on appeal, change its theory completely, and contend that petitioner should have requested an instruction inconsistent with the theory adopted by the Government? (See dissenting opinion of Judge Phillips, R. 605).

The Circuit Court of Appeals further held that the admission of this testimony generally and unrestricted, even if improperly considered by the jury for the truth of the matter, did not prejudice the petitioner because there was sufficient evidence to convince the jury without it. The truth of that statement is impossible to determine and, for that reason, it is a fundamental principle of general law that errors in the admission of evidence and the instructions to juries in criminal cases are presumed to be prejudicial to a defendant. In *Todd* v. *United States*, 221 F. 205, Judge Sandborn said:

> "Counsel for the plaintiff contend, however, that the error of the admission of this petition is so slight and technical, and the guilt of the defendant is so conclusively proved by other evidence, that the error should be deemed without prejudice to the defendant and the judgment against him should be affirmed. But the legal presumption is that error produces prejudice. It is only when the fact so clearly appears as to be beyond doubt that an error did not prejudice and could not have prejudiced the complaining party that the rule that error without prejudice is no ground for reversal can have effect."

Also, *Sprinkle* v. *United States*, 150 F. 56; *Fina* v. *United States*, 46 F. (2d) 643 (C. C. A. 10). In this case, a direct statement, from the deceased, reported on the witness stand, that the petitioner poisoned her, presented serious and fatal evidence which undoubtedly, if considered for its truth, would connect this defendant with the crime for which he was charged, a connection which otherwise would not exist in the circumstantial evidence presented by the Government (R. 606-7, dissenting opinion). There was by virtue of the highly prejudicial nature of the evidence here complained of a practical and actual injustice caused.

2. THE RIGHT TO A FAIR AND IMPARTIAL TRIAL IN A CAPITAL CASE DICTATES THAT THE RIGHT OF AN ACCUSED TO BE PROTECTED AGAINST UNFAIR AND PARTIAL COMMENT ON THE EVIDENCE, SHOULD NOT BE WAIVED BY NEGLECT OR INADVERTENCE OF COUNSEL.

Reference is hereby made to the principle established by the decided cases (Point C-1, p. 29) to the effect that in a criminal case, involving life and liberty of the accused, the appellate courts of the United States may notice and correct, in the interest of a just enforcement of the law, serious errors fatal to the rights of the defendant, although these errors were not challenged or reserved by objection, exception or assignment of error.

Reserving to the trial court the right to comment fairly and impartially upon the evidence, but recognizing that his influence on the jury is necessary and properly of great weight, and that the slightest word and

intimation is received with deference and may be controlling, this Court, in *Starr* v. *United States*, 153 U. S. 614, 14 S. Ct. 919, 38 L. Ed. 841, has declared that:

> "When there is sufficient evidence upon a given point to go to the jury, it is the duty of the judge to submit it calmly and impartially. And if the expression of an opinion upon such evidence becomes a matter of duty under the circumstances of the particular case, great care should be exercised that such expression should be so given as not to mislead, and especially that it should not be one-sided. The evidence, if stated at all, should be stated accurately, as well that which makes in favor of a party as that which makes against him; deductions and theories not warranted by the evidence should be studiously avoided. That can hardly fail to mislead the jury and work injustice" (l. c. 626).

And in *Reynolds* v. *United States*, 98 U. S. 145, 25 L. Ed. 244, speaking of the review of the evidence, this Court stated that:

> "* * * every appeal by the court to the passions or the prejudices of the jury should be promptly rebuked, and * * * it is the imperative duty of the reviewing court to take care that wrong is not done in this way * * *" (l. c. 168).

In *Cline* v. *United States* (C. C. A. 8), 20 F. (2d) 494, Judge Lewis said:

> "* * * the court's * * * comment on the facts * * * were not fair to the defendant. Only the facts that might have a tendency to

> weigh against the defendant were pointed out—none that weighed in his favor were mentioned. If the court feels that it is under duty to review the facts for the purpose of aiding the jury in a correct understanding of them, it must do so in fairness to both litigants and not state only the facts on one side of the issue'' (1. c. 496).

In *Minner* v. *United States* (C. C. A. 10), 57 F. (2d) 506, Judge Phillips said:

> ''The trial judge undertook to sum up and comment on the evidence. He narrated the important facts testified to by witnesses for the government but he wholly failed to sum up the evidence in behalf of Minner. His comments were in the nature of an argument to the jury rather than a fair and dispassionate statement of what the evidence showed and a tempered expression of his opinion as to the facts. In doing so, he assumed the role of advocate rather than an impartial judge. That this is error is established by repeated decisions'' (1. c. 513).

To the same effect are:

Hickory v. *United States*, 160 U. S. 408, 16 S. Ct. 327, 40 L. Ed. 474;

Rudd v. *United States* (C. C. A. 8), 173 F. 912;

Wallace v. *United States* (C. C. A. 6), 291 F. 972;

Weare v. *United States* (C. C. A. 8), 1 F. (2d) 617;

O'Shaughnessy v. *United States* (C. C. A. 5), 17 F. (2d) 225;

Cook v. *United States* (C. C. A. 8), 18 F. (2d) 50, 51, 52;

Sunderland v. *United States* (C. C. A. 8), 19 F. (2d) 202.

The expression by the trial court, in opening his comments on the evidence, that:

> "from that time on until the date *this murder* is alleged to have been committed * * *"

was prejudicial. In view of conflicting testimony as to the cause of her death, evidence of suicidal intent, and the purely circumstantial character of the proof of murder, such a bold statement placed a definite emphasis upon the weight of the testimony and indicated to the jury that the proper finding from it all was *murder*. Thus the petitioner found himself at the outset in the hands of a jury whose only duty was to determine whether he had committed the murder.

After stating the testimony to the effect that mercury had been found in the viscera of the deceased, the court said to the jury,

> "There then arises these two questions:
> "Did this woman die of mercurial poisoning?
>
> "and, secondly,
>
> "Did the defendant, Charles A. Shepard, administer the mercury to her as charged in the Indictment?" (R. 585.)

In view of the abundant testimony of other causes of death and negativing death by mercuric poisoning, the statement, "Did this woman die of mercurial poisoning" foreclosed the consideration of other causes of death, and, instead of permitting the jury to weigh

all of the evidence and determine from it whether all other reasonable hypotheses than mercurial poisoning could be excluded, the court made the determination for them, and then emphasized it by saying, "The first question may not be difficult to answer" (R. 585). And assuming that the jury was satisfied that death had been caused by mercurial poisoning, the fact that there was abundant evidence as referred to in the petition (p. 8) that the mercury found in the viscera could have got, and did get there, and had been absorbed from mercury mouthwash, the second interrogatory that, "Did the defendant, Charles A. Shepard, administer the mercury to her as charged in the Indictment," tended to emphasize that fact and minimize every other method by which the mercury got into the deceased's body. Thus, instead of giving the petitioner the benefit of the doubt, the court cast the burden upon him, in that, as stated, the question caused the jurors to start with the proposition that Shepard administered the poison and weigh all other methods against it to see if the evidence of them would be heavy enough to overcome the starting conclusion that Shepard had administered it.

The court stated the evidence favorable to the Government with great minuteness but did not state the evidence favorable to the defendant fully and accurately. In his comment as to the cause of death he took each of the Government specialists by name, told what each did and testified to, and that each had expressed the opinion that Mrs. Shepard had died from mercurial poisoning (R. 585-6); told the interesting things about

the action of mercury upon the human system, but all that the court said with reference to other causes of death was that, "There was evidence tending to show that the deceased, Zenana Shepard, had made threats of suicide and statements to the effect she wanted to die" (R. 590), and that: "Major Rose had diagnosed her case as Vincent's angina" (R. 587). No other comment was made as to the other causes of death. Although the evidence showed an abundance of evidence indicating that death might have been caused by other diseases or suicide, and which negatived mercuric poisoning (Petition pp. 6-8), the court failed to state any of it.

In his comment on the evidence as to whether Shepard administered the poison, the court stated that as a physician and Officer of the Day, petitioner had access to the dispensary where there was bichlorid of mercury; that he had written three prescriptions in December, 1928, March and April, 1929, for mercury; that he had got two boxes of empty capsules in March or April, 1929, and then discussed the motive growing out of the relationship with the Brandon girl (R. 587-8-9). The only statement made by the court to the jury as to the other evidence showing how the mercury got in the viscera was that, "There was * * * also evidence as you will recall, tending to show she might have been poisoned by the mouthwash" (R. 590), and that, "There has been testimony introduced that the deceased might have absorbed by the use of this mouthwash, if that quantity were used, enough mercury to account for the amount of mercury found in the

viscera of the deceased" (R. 587). Would it not have been more judicial and fair to have pointed out the evidence of both Government and defense witnesses tending to prove death could have been and possibly was caused by the absorption of mercury with which she was being treated for another disease (see Petition, p. 8)?

In the light of this testimony, the amount of mercury mouthwash used by Mrs. Shepard was important. The court told the jury that Major Rose had prescribed a mouthwash but did not even state that it contained mercury when he prescribed it (R. 587), nor that Rose said that four or five pints of this solution were used during the time he treated her (R. 371) and that each pint contained approximately 2 grains of mercury (R. 370). The court stated that if that quantity were used enough mercury might be absorbed to account for the amount found in the viscera (R. 587) but immediately stated that Nurse Brown testified that only about ½ pint of the solution was used (R. 587), but did not state that Major Rose personally administered the mouthwash, sometimes twice a day, and over a period of two weeks—21 times in all—and personally administered more than a pint of the solution to Mrs. Shepard (R. 570); and left the implication that Shepard, as Officer of the Day, probably was the one who got the poison, and administered it, by failing to state any of the other evidence to show that there was nothing unusual about Dr. Shepard's getting mercury (Petition, pp. 8-9).

Such unfavorable and one-sided comment was bound to be prejudicial and the court should protect the

petitioner therefrom in the interest of a fair administration of justice.

D.

The Circuit Court of Appeals erred in finding and holding that there was no error in the trial court's disqualifying jurors who had not formed an opinion, or without examining them to ascertain whether they had formed an opinion, where the defendant had exhausted all of his peremptory challenges, and that under such circumstances the accused had had a fair and impartial trial.

The Sixth Amendment to the Constitution of the United States provides that:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy public trial, by an impartial jury of the state and district wherein the crime shall have been committed * * *."

Sec. 411 of Title 28 U. S. C. A., being Sec. 275 Judicial Code, provides:

> "Jurors to serve in the courts of the United States, in each state respectively, shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law in such State may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned."

Sec. 424 U. S. C. A., Title 28, being Sec. 287, Judicial Code, provides that:

> "When the offense charged is treason or a capital offense, the defendant shall be entitled to twenty and the United States to six peremptory challenges. * * * All challenges, whether to the array or panel, or to the individual jurors for cause or favor, shall be tried by the court without the aid of triers."

Secs. 43-102, 43-140, 43-141, and 60-2906 R. S. Kansas, 1923, with reference to the qualifications of jurors, are set out as Appendix "A."

Three jurors were disqualified who upon examination stated that they had no opinion and seven were excused, summarily, without any examination by which it could be ascertained whether or not they had an opinion (R. 38-49).

The mere reading of a newspaper account pertaining to a case or trial does not disqualify a juror. This rule was established by this Court in *Reynolds* v. *United States*, 98 U. S. 145, 25 L. Ed. 244, wherein the court said:

> "The theory of the law is that a juror who has formed an opinion cannot be impartial. Every opinion which he may entertain need not necessarily have that effect. In these days of newspaper enterprise and universal education, every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits. It is clear, therefore, that upon the trial of the issue of fact

> raised by a challenge for such cause the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality. The question thus presented is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence."

To the same effect see *State* v. *Medlicoti*, 9 Kan. 257; *State* v. *Spaulding*, 24 Kan. 1; *State* v. *Morrison*, 64 Kans. 669, 678; *Hopt* v. *Utah*, 120 U. S. 430-432.

The Circuit Court of Appeals held that the determination of the qualifications of jurors was for the trial court and was not reviewable unless there was an abuse of discretion and that was not shown (R. 595). The error complained of is not because the court examined the jurors but that it neither examined them nor permitted them to be examined, to determine whether they entertained an opinion, and that to thus excuse them summarily was an abuse of discretion. This court has determined the specific manner in which disqualification should be determined. Chief Justice Waite, in *Spies* v. *United States*, 123 U. S. 179, 8 S. Ct. 30, 31 L. Ed. 80, stated that before jurors could be excused for cause it should have been

> "made clearly to appear that upon the evidence (that) the court ought to have found the juror had formed such an opinion that he could not, in law, be deemed impartial."

In *Reynolds* v. *United States*, 98 U. S. 145, 156, 157, 25 L. Ed. 244-6-7:

> "The affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the persumption of partiality, the juror need not necessarily be set aside. * * *"

And in *Remus* v. *United States,* 291 F. 501, the court said:

> "* * * the court should consider the statements made under oath by the juror himself in reference to his impartiality and his freedom from prejudice. * * *"

The right of the trial court to determine the qualifications of jurors is not absolutely final, otherwise the courts would not have stated that it could be reviewed in the event of an abuse of discretion. Counsel are not able to find any Federal cases bearing directly on the point in the case at bar. But that matter has been touched squarely in the following cases:

State v. *Willie,* 130 La. 454; 58 So. 147;
Welsh v. *Tribune Publishing Co.,* 83 Mich. 661, 47 N. W. 562;
State v. *Diedtman,* 58 Mont. 13, 190 Pac. 117;
Aaronson v. *State,* 56 N. J. L. 9, 27 Atl. 937;
Hildreth v. *City of Troy,* 101 N. Y. 234; 4 N. E. 599;

from which these principles are deducible: That a court has no right of peremptory challenge; that an accused need not take a jury selected for him by the court, but is not only entitled to a fair and impartial jury, but to a jury selected by method established by law, and that it cannot be said that no injury re-

sults to the accused because he "still had a fair and impartial jury," for he is entitled to have the benefit of the range of selection from the panel not limited by disqualifications not based upon a determination of the fact.

The defendant exhausted all of his challenges (R. 49). The practical result is that the court on his own motion, and without good cause, excused 10 jurors whom the defense might not have desired to excuse and in that way added to the number of peremptory challenges available to the Government. When the court excused the juror without any cause whatsoever, he in effect exercised a peremptory challenge. His discretion is confined to excusing the juror, not upon his own volition, but upon a determination based upon the facts that there is a good ground for believing that he would not be impartial. If he can discharge one in that manner, he can discharge any number and thereby confine the accused to a choice of jurors from a part of the panel of his own choosing rather than from the whole. Had the court permitted their examination and it were shown that there was no basis upon which to disqualify, then there would have been 10 competent jurors available to the defendant, selected according to law, whose right to have passed upon his case was a right of the petitioner but to whom the court has said, "No, you cannot choose from these, you must pick out of this other group whom I think will make good jurors for you."

We submit that under the authorities cited a fair and impartial jury includes the right to have a choice of the best men on the panel, selected by the methods

established by law, without having the range of selection limited by excluding from the panel competent jurors without legal cause.

Petitioner earnestly submits that the United States Circuit Court of Appeals, Tenth Circuit, committed prejudicial error in its rulings on the matters hereinabove discussed, and that, in view of the vital importance of the questions involved to the rights of this petitioner, and the fair and clear administration of justice, this Court should issue its writ to review and decide these questions.

Respectfully submitted,

HARRY W. COLMERY,
BALFOUR S. JEFFREY,
C. L. KAGEY,
L. M. KAGEY,
Counsel for Petitioner,
Charles A. Shepard.

APPENDIX A.

"They shall select from those assessed on the assessment roll of the preceding year suitable persons having the qualifications of electors, and in making such selection they shall choose only those who are not exempt from serving on juries, and who are possessed of fair character and approved integrity, and in possession of their natural faculties, and not infirm or decrepit, and who are well informed and free from legal exceptions: *Provided,* That no person shall be selected as a juror who either in person or by any other means shall solicit his selection as such; and the trustee of each township and the mayor of each city shall each select at least one such person for each fifty inhabitants therein" (Sec. 43-102 R. S. 1923).

"None of the following persons shall be compelled to serve as jurors: *First,* any member of the militia or fire company; *second,* any person under the age of twenty-one years or over the age of sixty-five years; *third,* any person who is not sufficiently acquainted with the English language to read and write the same and to understand thoroughly the proceedings ordinarily had in courts of justice; *fourth,* any person exercising the functions of clergyman, practitioner of medicine, druggist or apothecary, attorney at law, or any professor or other teacher of any school or institution of learning; *fifth,* any person of bad reputation or without visible means of support; *sixth,* any person who has served on a regular panel as a juror in any court of record in the county within one year last passed; *seventh,* any person who has been convicted of a felony; *eighth,* any person not drawn or selected according to the povisions of this act; and every juror selected according to this act shall possess the qualifications required by the laws of this state" (Sec. 43-140 R. S. 1923).

"Any party may challenge any juror for cause for any reason mentioned in the last section, and also for any causes authorized by the laws of the state" (Sec. 43-141 R. S. 1923).

"It shall be good cause for challenge of any person called to serve as a petit juror that he has been convicted of any crime which by law renders him disqualified to serve as a juror; or that he has been arbitrator of the same controversy, or has an interest in the action, or has an action pending between himself and any party to the action, or is the employer, employee, counsellor, attorney or agent of either party, or is a witness in the action, or is of kin to either party, or is not qualified, under the law of the state, to serve as a juror, or has served on a jury as a talesman on the trial of any cause in the same court during the term, or has formerly been a juror in the same action; *Provided,* That in actions against cities or other municipal corporations a taxpayer therein shall not be disqualified by reason thereof. These causes shall be considered as principal causes of challenge, and their truthfulness be tried by the court. Any person called to serve as a petit juror against whom no principal cause of challenge exists may nevertheless be challenged on suspicion of favor to or prejudice against either party to the action, or for inability to read the English language, or for want of competent knowledge of the language, or for any other cause that in the opinion of the court may render him at the time an unsuitable juror. The validity of such challenge shall be determined by the court" (Sec. 60-2906 R. S. 1923).

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933.

No. 50

CHARLES A. SHEPARD, PETITIONER,

vs.

THE UNITED STATES OF AMERICA, RESPONDENT.

Petition for Certiorari Filed May 8, 1933. Certiorari Granted May 29, 1933.

SUPPLEMENT TO THE BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

HARRY W. COLMERY,
C. L. KAGEY,
BALFOUR S. JEFFREY,
L. M. KAGEY,
Attorneys for Petitioner.

DORAN, KLINE, COLMERY & COSGROVE,
KAGEY, BLACK & KAGEY,
Of Counsel.

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ERRATA—ORIGINAL BRIEF.

Page	Line	
2	12	"attendent" should read "attended"
5	13	(R. 45-93) should read (R.45-49)
7	20	R. 511 should read R. 505
8	7	R. 391 should read R. 391-2
25	18	R. 626 should read R. 627
26	5	135 N. E. 667 should read 135 N. E. 647

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933.

No. 50

CHARLES A. SHEPARD, PETITIONER,

vs.

THE UNITED STATES OF AMERICA, RESPONDENT.

Petition for Certiorari Filed May 8, 1933. Certiorari Granted May 29, 1933.

SUPPLEMENT TO THE BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Counsel for the petitioner file this supplement to the brief in support of the petition for writ of certiorari with the hope that it will be of assistance to the Court in determining the issues involved. Reference will be made to the page of the original brief, and the point argued therein to which each item set out herein has reference.

This cause is here on a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit, petition for which was filed in this Court on May 8, 1933, and granted on May 29, 1933.

BRIEF PAGE 14, I:

The opinion of the Circuit Court of Appeals for the Tenth Circuit denying a rehearing, which was not yet

reported at the time of the filing of the petition for certiorari, is reported in *Shepard* v. *United States,* 64 Fed. (2d) 641.

BRIEF PAGE 16, POINT A, 1:

The Declarations Were Not Admissible for Truth of the Matter Asserted As Dying Declarations.

The following is directed to the support of Point A, 1 (a) found on pages 16 and 17 of the brief in support of the petition for certiorari and further in support of the opinion of the Circuit Court of Appeals holding the testimony of Sergeant Gresser and Clara Brown reporting hearsay statements of Mrs. Shepard inadmissible as dying declarations because there was lacking the requisite guaranty of trustworthiness in a belief of imminent and impending death on the part of the declarant (R. 598, 602).

The law requiring as a preliminary matter to the admission of a dying declaration as a hearsay exception, that the declarant be possessed of a *consciousness* or *belief of imminent* or speedy death, is well established in every state and Federal jurisdiction.

Mr. Justice Fuller, in *Mattox* v. *U. S.*, 146 U. S. 140, on writ of error from the District Court of the United States, for the District of Kansas, aptly puts it (l. c. 152):

> "The point is to ascertain the state of mind at the time the declarations were made. The admission of the testimony is justified upon the ground of necessity, and in view of the consideration that the certain expectation of almost immediate death will remove all temptation to falsehood, and enforce

as strict adherence to the truth as the obligation of an oath could impose. But the evidence must be received with the utmost caution, and if the circumstances do not satisfactorily disclose that the awful and solemn situation in which he is placed as realized by the dying man, because of the hope of recovery, it ought to be rejected."

The testimony of Sergeant Gresser shows absolutely nothing from which it could be found Mrs. Shepard had such a belief of imminent and speedy death as to provide the foundation for the admission of her statement as a dying declaration. His testimony is as follows:

TESTIMONY OF SERGEANT GRESSER.

J. C. Gresser:

"I had a conversation with Mrs. Shepard about May 25th, about four or five days after she took sick, relative to her symptoms.

Q. Did she, at that time, detail any symptoms at all?

A. Yes, sir.

Q. What did she tell you?

Mr. Kagey: Just a moment; we again object; this woman had six doctors, she did not have to detail symptoms or hold conversations with anybody else about her illness, and not shown to have occurred in the presence of the defendant, and hearsay.

The Court: You may answer.

Mr. Kagey: We except.

A. Yes, sir; she told me she believed she was being poisoned, and asked me if I could run some whiskey for arsenic that she had.

Mr. Kagey: Wait a moment; we move to strike out the testimony of the witness as incompetent,

prejudicial, hearsay, not in the presence of the defendant, being matters of opinion, and not statements of fact, and not tending to prove or disprove any of the issues.

The Court: Overruled. Is that all?

Mr. Kagey: What is that?

The Court: No cross examination?

Mr. Kagey: We have moved to strike out. I moved to strike it out, did I not? I do not think I should cross examine after I move to strike it out.

The Court: Very well, you will be excused.

Mr. Kagey: I note an exception.

* * *

Q. Did she make any statement in reference to the amount you would have to have?

A. Yes, sir.

Q. What did she say?

Mr. Kagey: Wait a moment; amount of what? We object to this—

Mr. Brewster: You better go back.

The Court: Yes, you better come back to the stand.

Mr. Brewster: I will ask the question again:

Q. Did she make any additional statement in reference to this matter?

A. Yes, sir.

Q. What did she say?

Mr. Kagey: We object to this as hearsay, not occurring in the presence of the defendant.

The Court: She may answer.

Mr. Kagey: We except.

She wanted to know how much whiskey it would take to run for arsenical poison, or other kind of poison, and I told her it would take approximately three ounces.

Mr. Kagey: We object to that question also and move to strike it out, and also the answer, upon the same grounds. I did not have time to state it. We move to strike out the answer as hearsay, not occurring in the presence of the defendant.

The Court: It may stand.

Mr. Kagey: We except.

Mr. Brewster: Q. What did she say then?

Mr. Kagey: We object to this question for the reason that it would be hearsay, not occurring in the presence of the defendant, and incompetent under any theory.

The Court: He may answer.

Mr. Kagey: We except.

A. She said there was not enough whiskey to run for that—to let it go.

Mr. Kagey: Move to strike out the answer—

Mr. Brewster: That is all.

Mr. Kagey: —as hearsay, incompetent, and not made in the presence of the defendant.

The Court: Overruled.

Mr. Kagey: We except" (R. 540-542).

In spite of a total failure of any evidence to warrant even a suspicion that Mrs. Shepard at the time of the declaration to Sergeant Gresser expected death immediately, the trial court admitted the evidence unrestricted and unlimited to the consideration of the jury and over the objections of counsel for appellant at the trial.

It is also to be observed that Mrs. Shepard, the declarant, is reported by the witness to have said, "Yes, sir, she told me she believed she was being poisoned * * *." That is a statement of opinion and not one of fact, and, therefore, for this further reason, not ad-

missible as a dying declaration. *State* v. *O'Shea,* 60 Kan. 772, 57 Pac. 970; *Ehrhardt* v. *People,* 51 Colo. 205, 117 Pac. 164; *State* v. *Wilks,* 278 Mo. 481, 213 S. W. 118.

In addition, that the declaration may be admissible the declarant must have actually observed, or had opportunity for observation of the fact related. Wigmore, Evidence, 2nd Ed., Vol. III, Sec. 1445. In *State* v. *Wilks, supra,* a dying declaration was excluded because the declarant could not have made the statement from personal observation. Because it was impossible for the declarant to have seen who shot him, declarations were rejected in *Jones* v. *State,* 52 Ark. 347, 12 S. W. 704. Also, *Berry* v. *State,* 63 Ark. 382, 38 S. W. 1038, a declaration that whiskey the defendant gave him was poisoned was excluded. *Jones* v. *State,* 79 Miss. 309, 30 So. 759.

The testimony of Sergeant Gresser and likewise Nurse Brown, as shown hereafter, shows absolutely nothing from which it could be found that Mrs. Shepard actually observed, or even had the opportunity for observation of the fact related, and that the statement by Mrs. Shepard was pure conclusion, imagination or deduction from facts not detailed in the evidence.

Mrs. Shepard was taken ill on the evening of May 20, 1929. Nurse Brown arrived at the Shepard apartment and went on duty that night. She testified the declaration here complained of was made by Mrs. Shepard the next day and on the second day of her illness. Mrs. Shepard's death occurred on June 15, 1929 (R. 86), 24 or 25 days after the statement was alleged to have been made to Nurse Brown. The testimony of Nurse Brown is as follows:

TESTIMONY OF NURSE BROWN.

Nurse Clara Brown:

"I have testified before in this case. I had conversation with Mrs. Shepard the second day I was there and her mind was normal; she was rational.

Q. Did she at that time make any statement to you?

Mr. Kagey: Wait a moment; she answered before I could object. I want to object to the question, and move to strike out the answer for the reason that it calls for the opinion and conclusion of the witness, and no proper foundation laid for the hearing of the testimony by this witness.

Mr. Brewster: I will withdraw it then.

Mr. Kagey: And also that it is not rebuttal.

Mr. Brewster: Q. Did you talk with her?

A. Yes.

Q. Did she answer your questions intelligently?

A. She did.

Q. Did she make any statement to you in regard to what she thought about getting well?

A. Yes.

Mr. Kagey: Wait a moment—

Mr. Brewster: Q. What was it?

Mr. Kagey: We object to this as incompetent, irrelevant and immaterial, a conversation occurring in the absence of the defendant, and hearsay; not rebuttal.

The Court: She may answer.

Mr. Kagey: What was the ruling?

The Court: She may answer.

Mr. Kagey: Exception.

Mr. Brewster: What was it? What did she say? Read the question.

(Last question read as above recorded.)

A. She said she was not going to get well.
Q. Did she make any statement as to what was going to happen to her?
A. She was going to die.

Mr. Kagey: Wait a moment; we make the same objection to that question, and move to strike out the answer, for the reason that it is hearsay, not made in the presence of the defendant, incompetent, irrelevant and immaterial, and not rebuttal.

The Court: Overruled.

Mr. Kagey: Exception.

Mr. Brewster: Q. Did she, at that time, or at any time, or at any time after that, ever express in your presence any idea that she was going to get well?
A. No.
Q. Did she afterward, and at different times, make any statement to you as to whether she would, or would not get well?
A. Yes.
Q. What did she tell you?
A. She—

Mr. Kagey: We object to that, for the reason that it is hearsay, incompetent, irrelevant and immaterial, not shown to have been made in the presence of the defendant, not rebuttal.

The Court: She may answer.

Mr. Brewster: Q. At the time—

The Court: Just a moment; let her answer.

Mr. Brewster: Oh, pardon me. Read the question.

(Last question read as above recorded.)
A. She said she was going to die.
Q. At the time she told you, on the second day that you were there, that she was going to die, did

you, at that time and in that connection, have a conversation with her in reference to her condition?

A. Yes.

Q. What was it?

Mr. Kagey: We object to that as hearsay, not made in the presence of defendant, incompetent, irrelevant and immaterial.

The Court: You may answer.

Mr. Kagey: We except.

The Court: Read the question, Mr. Reporter.

(Last question read as above recorded:)

A. She asked me if I would do her a favor. I consented. Then she told me to go to Major Shepard's room and, in his closet, get a quart whiskey bottle off the shelf.

Mr. Kagey: What kind of a whiskey bottle?

The Witness: It was a quart.

Mr. Kagey: A quart?

The Witness: Yes. It was a dark green whiskey bottle, with a whiskey label, which she said was the one—

Mr. Brewster: Did you make more than one trip before you brought the bottle?

A. I did.

Q. Go ahead and state what she said to you.

A. She asked me to smell the contents. I did so. She then asked me if it smelled peculiar. I told her I did not know. She asked how much was in the bottle. I noticed there was not more than a tablespoonful; there was not more than a tablespoonful; and told her.

Q. Speak a little louder.

A. She said she knew there could not be but a small amount, because the last time she had taken a drink out of that bottle, she made a remark to Major Shepard, that there was not only enough for

about one more drink, and she was going to save that until she needed it. She asked if that was enough to test for poison. I told her I did not know.

Q. What did she say with reference to that liquor, when she and the Major had it, whether it was good or bad whiskey?

A. It was good.

Mr. Kagey: Just a moment. We move to strike out the answer, and object to the question, for the reason that it is incompetent, irrelevant and immaterial, hearsay called for from this witness, and is not rebuttal.

The Court: Please read the question, Mr. Reporter.

(Last question read as above recorded.)

The Court: You may answer.

Mr. Kagey: Except.

A. It was good.

Mr. Brewster: Now, go ahead and state what, if anything, she said as to how she took sick, and what she did.

Mr. Kagey: We object to this as incompetent, irrelevant and immaterial, hearsay, not rebuttal testimony, incompetent, irrelevant and immaterial.

The Court: She may answer.

Mr. Kagey: Except.

A. She stated that this was the bottle from which she drank just before collapsing on the evening of May 20.

Mr. Brewster: Q. What did she say as to the taste of it the night she took sick, the 20th?

Mr. Kagey: Object to this as leading.

Mr. Brewster: What, if anything?

Mr. Kagey: Objected to for the further reason that it is hearsay, not rebuttal, a conversation not shown to have been made in the presence of the defendant.

The Court: You may answer.
Mr. Kagey: Except.
A. It was altogether different.
Mr. Brewster: What did she say? Give her words.
A. It was not good.
Q. Did she say anything about how it tasted?
Mr. Kagey: Same objection.
The Court: You may answer.
Mr. Kagey: Except.
A. She said that she was being poisoned.
Mr. Brewster: What did she say? Give her words.
Mr. Kagey: All right; we object to this, also, as incompetent, irrelevant and immaterial, hearsay, not made in the presence of the defendant, not rebuttal.
The Court: You may answer.
Mr. Kagey: Except.
A. She said: 'Dr. Shepard has poisoned me'" (R. 562-565).

The above testimony of Nurse Brown does not reveal a belief on the part of Mrs. Shepard of a "certain expectation of almost immediate death." That she believed she would not recover, or did not want to recover, is not sufficient. Her state of mind at the time of the statement must evidence her belief that death was impending and sure to speedily follow.

Neither does the record reveal, from the testimony of other witnesses, that Mrs. Shepard had such a belief at the time the declaration was made as to provide the requisite guaranty of trustworthiness. Numerous witnesses testified that Mrs. Shepard made statements that she was going to die and wanted to die long before she

was even taken ill and before the declaration reported by Nurse Brown was made.

Ruth Winchester testified that some time in October, 1928, approximately eight months before Mrs. Shepard made the declaration in question, she, Mrs. Shepard, expected to die and did not want to live and expected soon to go back to California, in a box (R. 482, 483).

Robert Crawford related a conversation which took place two weeks before Mrs. Shepard became ill to practically the same effect (R. 489).

Mrs. Veda Snyder testified to statements of Mrs. Shepard made several days before her illness that she expected to die (R. 497). However, such evidence, gathered from statements made from almost a year to several days before even her illness, can have no relevancy to show Mrs. Shepard's belief of death at the time of the declaration which occurred after her illness, but they do reveal a continued morbid state of mind which cast grave doubts upon her actual belief of impending death at the time of her statement to Nurse Brown, as it appears to have been common for Mrs. Shepard to say that she wanted to and expected to die long before her illness. It is not proper foundation for a dying declaration that the declarant expresses an intention or desire to die or belief that they will die some time.

J. C. Dye, who saw Mrs. Shepard on the same morning in which she made the declaration to Nurse Brown, testified that Mrs. Shepard was more annoyed than depressed (R. 360).

Helen Holycross testified that the morning after Mrs. Shepard was taken sick, "I was in her room and

Major Shepard came in, and told her to take care of herself, and hurry up and get well, and he would send her to California for a complete rest, and she said, yes, she would in a box" (R. 486). Mrs. Shepard was only here repeating a statement which she had previously made to Ruth Winchester, even before her illness, that she would return to California in a box (R. 482). The simple statement testified to by Helen Holycross does not in any way indicate the belief of the approach of a speedy death.

Several witnesses testified to statements made subsequent to the declaration of Nurse Brown. When Major DuFrenne, a Government witness, visited Mrs. Shepard in the second week of her illness, "she appeared glad to see me and she said 'You will get me well, won't you?'" (R. 94).

Walter Rose testified that on several occasions fourteen or fifteen days prior to her death, or about twelve days after the statement to Nurse Brown, Mrs. Shepard said, in effect, that she did not want to get well, that she wanted to die (R. 372).

Robert Crawford testified that in a conversation with Mrs. Shepard several days after she became ill, she said she did not want to get better (R. 489).

Elizabeth Strickler testified that a week after Mrs. Shepard's first illness, she seemed in a very happy frame of mind and said she was much better (R. 493).

Further description of the condition of Mrs. Shepard and her state of mind may be gathered from pages 14 to 19 of this supplement.

Examination thus made of the record leaves the inescapable conclusion that the requisite foundation for the admission of Mrs. Shepard's opinion as to the cause of her death is lacking, and the statements reported by Nurse Brown and Sergeant Gresser were not admissible as dying declarations for truth of the matter asserted and that the Circuit Court of Appeals was correct in its rule that the testimony was improper as a dying declaration.

BRIEF PAGE 23, POINT A, 2:

The Declarations of Mrs. Shepard Were Not Surrounded by Guaranties of Trustworthiness and Were Not Made at a Time and Under Such Circumstances As to Be Free from Suspicion of Misrepresentation.

Were the declarations of Mrs. Shepard made at a time and under such circumstances as to be surrounded by guaranties of trustworthiness and free from suspicion of misrepresentation? The Circuit Court is not silent. In holding that the declarations were not admissible as dying declarations, it has answered a positive "No."

Major Hawley, a witness for the Government, testified that when he first saw Mrs. Shepard during her illness on May 21 (the *very day of the declaration* testified to by Nurse Brown):

> "Mrs. Shepard was in bed, weak, ill, gave a history as having vomited a great deal the evening before and throughout the night, was still nauseated, the pupils dilated, weak, had a slight mental confusion which could be penetrated, that is, she would answer intelligently if you repeated your questions

and was in a general condition which might be a mild collapse or recovery from collapse. She apparently got better (R. 63). * * * When I came to see her the morning after I think Major Shepard told me about her mental condition the night before. When I called to see her she had slight confusion and loss of memory. She did not show any particular cerebral excitability like 'picking things out of the air.' Major Strickler may have told me of her symptoms although I have no recollection. Symptoms like she had I think could be caused by alcohol" (R. 88-89).

Major Strickler, a witness for defendant, testified that he was called the first night of Mrs. Shepard's illness (R. 354) and attended her daily during four or five days (R. 355). He described her at his first call (and that before declaration to Nurse Brown) as follows:

"Mrs. Shepard was lying in bed, fully clothed, and was apparently hearing voices. She continually reached out, as if picking objects out of the air, brushing them off of her bed, and she was blind to the extent that she could not recognize fingers held in such a manner (indicating) before her eyes, and she complained of some numbness in her lower extremities. The pupils of her eyes were widely dilated, there was no reaction to light, and her knee-jerks were absent, and could not be obtained. * * * The odor of alcohol was very strong on her breath" (R. 354).

Diagnosed the condition as polyneurotic alcoholic psychosis; that is,

"simply a disorder of the mind characterized by these hallucinations, and the idea that she had been

doing certain things which she had not done, and this mental picture was associated with the neuritis, which included the impairment of her vision, amounting to practical blindness, the loss of knee-jerks and her complaint of numbness in the extremities" (R. 354-5).

At the end of the first week of her illness Major Strickler described her condition as:

"Impairment of vision had improved and it was possible to break through her confusion and get some relevant and coherent answers from her (R. 356). * * * The plain fact that Mrs. Shepard had been confined to her bed for a number of days, she would tell me how she had gone down to Junction City that morning, or sometime during the day, and the various shops she had visited, the various ladies of the post she had conversed with, and how they would come home, and how they had lunched together, and played bridge in the afternoon, and where they had spent the afternoon, all of which was utterly impossible" (R. 356).

Nurse Brown, witness for the Government, testified:

"When I arrived, Mrs. Shepard's condition was, she was in bed, very ill, and delirious and had been vomiting. The next day she seemed better. For a few days she got better. With reference to her mental condition, she gradually cleared up. It was just a few days before it apparently cleared up. Her eyes were dilated (R. 137). * * * Mrs. Shepard was very ill and delirious. She talked in her delirium and I think she picked things out of the air, and her vision was blurred. She complained of disturbance of her vision" (R. 139).

Mrs. Gates, a witness for the Government, testified that when she arrived the evening on which Mrs. Shepard was taken ill, Mrs. Shepard's condition was as follows:

> "She was in bed with her clothes on. She was delirious. The pupils of her eyes were very large. She did not recognize me at that time. She did not recognize me at all that evening" (R. 56).

Major Dye, one of the attending doctors and a witness on behalf of the defendant, testified that on the morning of the declaration made to Nurse Brown, Mrs. Shepard's condition was as follows:

> "I noticed her vision. She could see things very dimly, she knew color in front of her vision, she could see, but she could not count fingers. Her vision was blurred. I thought her eye condition at that time was due to salicylic acid. I think possibly it could have been due to the use of bad liquor, bootleg liquor. I have never seen in mercuric poisoning, the conditions of the disc and retina as I have described it" (R. 360).

The foregoing testimony of both the Government and the defendant, as to Mrs. Shepard's condition, at about the time of the making of the declarations, draw a picture of a woman utterly incompetent to make, with clearness and accuracy and free from suspicion, a statement that would bare her true state of mind. The only state of mind it reveals, under these facts, is a condition of confusion that could not be relied upon. It is a picture of a mind tormented with insanity and irresponsibility. To those conditions of serious physical illness and mental unbalance must be con-

sidered the human unwillingness to publicly admit suicidal intent while still alive, and the natural willingness to wildly blame, in times of stress, someone often closest, as intimate friends or spouse, for results visited upon one through self faults. It only adds to the suspicious circumstances and chances of misrepresentation that played so vividly around the declarations of Mrs. Shepard.

Another circumstance should be noted by the Court which points suspiciously toward the unreliability of this evidence. It goes to both the circumstance surrounding the making of the declaration by Mrs. Shepard and to the reliability of the reporting by Nurse Brown. Nurse Brown, in answer to questions whether she had reported the statements of Mrs. Shepard before the trial, said:

> "I did not tell anyone about it. The first time I told anyone about it was after her death * * *. There were six or seven doctors on the case while I was there * * *.
>
> Q. Do you mean to say that you were on that case for twenty-five days, after you had been told by Mrs. Shepard that she was poisoned, and her husband had poisoned her, and poisoned her with this specific liquor, and never said a word to a soul about it?
>
> A. Yes, because she took me into her confidence" (R. 566).
>
> "Q. Do you think that excused you? That is your excuse?
>
> A. Yes, because I promised her I would not tell.
>
> Q. You promised her you would not tell?
>
> A. Yes.
>
> Q. You thought she knew what she was doing when she told you that?

A. Yes, I think she was.
Q. You never told a soul about it?
A. No.
Q. When did you first tell any of the Government detectives here?
A. Not until they came to see me.
Q. Not until they came to see you? When was that?
A. That was, I think, in December, I am not sure, but I think it was in December" (R. 567).

A registered nurse attending a case the exact nature of which was baffling to three or four doctors had failed to report a statement by the person ill that she was poisoned, which would have provided the clue for proper medical treatment, all because the sick woman had revealed it in confidence and upon promise not to tell. It is impossible to escape the conclusion that Nurse Brown either considered it an irresponsible statement and sick room chatter, made by a person delirious and in such circumstances of suspicion as to be unworthy of consideration and reporting, or that it was an after-thought on the part of Nurse Brown.

If it was the former, the evidence was incompetent under the Hillmon, Hayward and Trefethen cases (Br. 22-23). If it was the latter, possibly "the wish was father to the thought."

Brief Page 23, Point A, 2:

In *State* v. *Wilks*, 278 Mo. 481, 213 S. W. 118, the Court said:

"The questions arising on the admissibility of dying declarations have often received the consider-

ation of this court. It is a universal rule that a trial court must determine, in the absence of the jury, the preliminary question of whether or not the declaration offered is admissible."

Wigmore on Evidence, 2nd Ed., states the rule thus:

> "The admissibility of a given piece of evidence is for the judge to determine. This general principle is not disputed; its application to the various kinds of evidence—qualifications of witnesses, absence of a hearsay deponent, voluntariness of a confession, condition of a dying declarant, and so on—has already been considered under the various heads of evidence. It follows that, so far as the admissibility in law depends on some incidental question of fact—the absence of a deponent from the jurisdiction, the use of threats to obtain a confession, the sanity of a witness, and the like—this also is for the judge to determine, before he admits the evidence to the jury" (Sec. 2550).

And speaking specifically of dying declarations, Wigmore states the rule in Sec. 1451, as follows:

> "That the judge is to pass on the preliminary conditions necessary to the admissibility of evidence is unquestioned (*post* 2250). It follows, as of course, that, since a consciousness of impending death is according to the foregoing principles legally essential to admissibility, the *judge must determine* whether that condition exists before the declaration is admitted."

To the same effect see *Commonwealth* v. *Brown*, 164 Mass. 577, 582; *State* v. *Kunkel* (Mo.), 209 S. W. 865, 868.

BRIEF PAGE 26, POINT B:

The duty of the Court to restrict the application of testimony has been stated specifically in the following authorities:

In *State* v. *Lavin,* 80 Ia. 555, 46 N. W. 553; where the complainant was offering rebuttal evidence in a bastardy case regarding the paternity of the child, the defendant having testified as to certain admissions which were made during an effort to effect a settlement of the controversy, it was held that the Court has a positive duty to properly instruct the jury on the law affecting the offer to compromise.

In *State* v. *Collins,* 127 N. C. 667, 28 S. E. 520, when declarations of one or two defendants jointly on trial were admissible only against the one who made it, it was held error for the Court to fail to charge to that effect.

In *Thornley* v. *State,* 36 Tex. Crim. 118, 35 S. W. 981, where the Court had theretofore refused to hold it error, upon a rehearing it held it was fundamental error for the Court to fail to instruct the jury as to the purpose for which they should consider the testimony before them with reference to the passing by the accused of a forged instrument other than that for which he was being tried.

In *Barnett* v. *State,* 104 Ohio St. 298, 135 N. E. 667, speaking with reference to like actions which tended to prove moral perversions, the trial Court at the time of introduction of such evidence, or in its general charge, should limit the application of such evidence by the jury to such purpose.

In *Lanham* v. *State* (Texas Court of Criminal Appeals), 269 S. W. 799, the Court said:

"Generally where there is danger that testimony of another transaction in evidence than one relied on might cause conviction or might be given unwarranted weight by the jury as tending to prove main transactions, failure to limit testimony as to other transactions to purposes for which it is admitted is error" (Syl. 2).

And in *Elam* v. *State*, 16 Tex. Appeal Reports, 34, the Court stated the rule by which it was to be governed in determining whether error would warrant the reversal of judgment as follows:

"If there be a material misdirection of the law as applicable to the case, or a failure to give in charge to the jury the law which was required by evidence in the case, and the affirmative error, or the omission, is calculated, under all the circumstances of the case; to injure the rights of the defendant, this court should, for either of these errors, reverse the judgment."

BRIEF PAGE 42, POINT D:

Authorities Supporting Specification of Error D (Br. pp. 39, 43) In Support of Principles Stated That Accused Is Not Only Entitled to a Fair and Impartial Jury, But a Jury Selected by Methods Established by Law and from a Panel Not Limited by Disqualifications Not Based Upon a Determination of the Fact.

In *State* v. *Willie*, 130 La. 454, 58 So. 147, the Court stated:

"This rule necessarily implies that a competent juror duly accepted and sworn cannot be discharged without legal cause. If the reason for the exclusion of such a juror be insufficient, the judgment will be reversed."

In *Welch* v. *Tribune Publishing Company*, 83 Mich. 661, 47 N. W. 562, the Court, at page 563, says:

"We do not think the judge has a right to reject a disqualified juror with whom the parties are satisfied, unless for sufficient cause; and such cause should appear upon the record. *Pearse* v. *Rogers*, 2 Fost. & F. 137. *The circuit judge is not invested with any right of peremptory challenge.* He can excuse for cause, but the cause must be stated, so that it may appear of record. Proff. Jury, Section 140. The exercise of the power to discharge a juror by the circuit judge of his own volition is not a matter of discretion. It must be based upon some cause. It will not do to hold that a circuit judge may, without assigning any reason, discharge jurors at his mere will or caprice. If he may so discharge one juror he may discharge a dozen, and compel parties, after they have exhausted their peremptory challenges, to accept such a jury as he is satisfied with. Counsel for defendant contends that the record does not show that plaintiff was prejudiced, and that the presumption is in favor of judicial action. The record does disclose that the juror was one of the regular panel, and it further discloses that talesmen were resorted to in order to fill the panel which tried the cause. The law has provided measures for the selection and return of jurors to serve in the trial of causes, and a party has a right, if there be no legal objection to the jurors so returned, to have his cause tried by jurors so selected, unless rejected in the manner provided by law."

In *State* v. *Diedtman*, 58 Mont. 13, 190 Pac. 117 (1920) Syllabi 2, 3 and 4 are as follows:

"In a criminal prosecution, where the trial court, on examination of a venireman, interposed with the remark that, if the county attorney would

challenge, he would sustain the challenge, and it did not appear that there was any ground for sustaining a challenge for cause, such action of the court was erroneous, amounting to the exercise of peremptory challenge, which right the trial court does not possess, particularly as the right to challenge can be waived by failure to exercise (Syl. Para. 2).

"A defendant is not only entitled to a fair and impartial jury, but he is entitled to insist that the jury shall be selected according to the methods established by law (Syl. Para. 3).

"In a prosecution for sedition, the action of the trial court in announcing on *voir dire* examination that he would sustain a challenge to a veniremen, amounting to the exercise by the court a peremptory challenge, HELD most prejudicial, because indicating to the remaining jurors that the court entertained prejudice against any of the veniremen who manifested a friendly disposition toward the defendant" (Syl. Para. 4).

In *Aaronson* v. *State*, 56 N. J. L. 9, 27 Atl. 937, a juror was excused by the Court for cause and the Supreme Court in its opinion said:

"Nor do we think there is any substance in the suggestion that the power thus conceded will be liable to be abused, for it is certain that the court cannot arbitrarily, and of its own motion, excuse any of these jurors from serving in the given case, for, if no ground for the dispensation existed, the judicial action would be erroneous, and could be reviewed by means of a writ of error."

In *Hildreth* v. *City of Troy*, 101 N. Y. 234, 4 N. E. 559 (1886), the Court at page 561 made the following statement:

"It is said that no injury resulted to the defendant from the erroneous exclusion of the city

jurors, and a competent jury actually tried the case. The court cannot say that the trial would have resulted differently if the city jurors had not been excluded. On the other hand, the contrary cannot be affirmed. It is certain that except for the erroneous ruling the jury would have been differently constituted. Jurors differ in intelligence, judgment and fitness to act as jurors. It is, we think, the legal right of a party to have the chance that the best man may be drawn, and that the range of selection shall not be limited by excluding without cause competent jurors from the panel. It cannot be doubted that if an incompetent juror had been admitted, against the objection of the defendant, the judgment would be set aside, and yet in many cases it would be impossible to show any actual injury. A person not a resident of the county, or over 60 years of age, or without the requisite property qualification, is not a competent juror (Code Section 1027); but it would, we conceive, be no answer to an exception taken to his admission that no actual injury was shown to have resulted. The violation of the legal right of the party to have the case tried by competent jurors would be conclusive."

CONCLUSION.

For the reasons advanced in the petition for a writ of certiorari and brief in support thereof, together with supplement, it is urged that the judgment of conviction of the court below should be reversed.

Respectfully submitted,

HARRY W. COLMERY,
C. L. KAGEY,
BALFOUR S. JEFFREY,
L. M. KAGEY,
Attorneys for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 50

CHARLES A. SHEPARD, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The majority (R. 594) and dissenting (R. 600) opinions in the Circuit Court of Appeals are reported in 62 F. (2d) 683. In connection with the denial of a petition for rehearing, additional opinions were rendered both by the majority (R. 635) and the minority (638) of the court. These opinions are reported in 64 F. (2d) 641.

JURISDICTION

The judgment sought to be reviewed was entered January 9, 1933. (R. 607.) The petition for rehearing was denied April 5, 1933. (R. 642.) The

petition for certiorari was filed May 8, 1933, and granted May 29, 1933. (R. 649.) Jurisdiction to issue the writ is conferred upon this Court by Section 240 (a) of Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Was the declaration of deceased that "Dr. Shepard has poisoned me" competent as a dying declaration?

2. Was the admission of the declaration of deceased that "she believed she was being poisoned" prejudicial, if not competent to rebut the theory of suicide, advanced by the defense?

3. If these declarations of the deceased were competent only as tending to show her state of mind to rebut the theory of suicide, as held by the Circuit Court of Appeals, was it error in the trial court to fail to restrict the evidence to that purpose in the absence of such a request by the defense?

4. Did the trial court abuse its discretion in excusing men on the jury panel who admitted they had read a three column article printed in a newspaper two days before the trial, which purported to emanate from the defendant, and to be his statement of the facts in the case?

5. Will this Court consider the contention that the trial court was unfair in its summary of the evidence in its charge to the jury, where no exception was made to the charge at its conclusion, but on the contrary, at the conclusion of the charge, coun-

sel for the defendant stated that the defendant was entirely satisfied with the instructions?

STATEMENT

The petitioner (hereafter referred to as the defendant) was convicted in the District Court of the United States for the District of Kansas under an indictment which charged him with murdering his wife, Zenana Shepard, on June 15, 1929, at Fort Riley, Kansas, a United States military reservation, by administering to her a poison known as bichloride of mercury. (R. 1–2, 26.) The jury having added to their verdict the words "without capital punishment," the court sentenced the defendant to imprisonment for the period of his natural life. (R. 30.) Upon appeal to the Circuit Court of Appeals for the Tenth Circuit, the defendant's conviction was affirmed, one judge dissenting. (R. 593–642.)

As the defendant does not now contend that the evidence was insufficient to warrant the submission of the case to the jury, it would serve no useful purpose to summarize the testimony. A summary appears in the majority opinion below at pages 595–598 of the record. That opinion discloses not only that the defendant practically conceded in the Circuit Court of Appeals that Mrs. Shepard's death was caused by mercury poisoning (R. 597), but that the evidence was so convincing as to give the jury ample justification for its finding that the defendant administered the poison.

ARGUMENT

One of the theories of the defense was that Mrs. Shepard committed suicide.[1] To establish this defense the defendant introduced various statements made by the deceased prior to her last illness to the effect that she did not care to live and contemplated taking her own life. (R. 405, 421, 483, 489, 497.) The defense also introduced certain statements made by the deceased during her last illness which indicated that she did not desire to get well. (R. 361, 372, 486, 489.)

In rebuttal the Government recalled two of its witnesses, Clara Brown, a nurse who attended Mrs. Shepard during practically the entire period of her fatal illness (R. 137–138, 342, 565), and Sergeant J. C. Gresser, who was in charge of a laboratory at Fort Riley and who made certain blood tests during Mrs. Shepard's illness. (R. 134, 136, 539.) Nurse Brown testified that on the second day she was on the case (about two days after Mrs. Shepard was taken ill) she had a conversation with Mrs. Shepard in which the latter said that "Dr. Shepard has poisoned me." (R. 562, 565.)[2]

---

[1] See hypothetical question addressed to a defense witness at R. 403.

[2] Mrs. Shepard was taken ill on the evening of May 20, 1929. (R. 137, 422.) We think it is a fair inference from the testimony that Nurse Brown arrived on the case shortly after midnight of May 20. (R. 56–57, 137, 423.) It would appear, therefore, that Mrs. Shepard made the statement to Nurse Brown quoted above on May 22, 1929.

Sergeant Gresser testified that on the fourth or fifth day of Mrs. Shepard's illness Mrs. Shepard told him that "she believed she was being poisoned." (R. 540.)[3] These statements of the deceased were admitted as evidence over the objection of the defendant, and their admission constitutes the principal question in dispute. The majority below held that they were not admissible as dying declarations but were admissible for the purpose of disproving a state of mind disposed toward suicide. They also held that the defendant had waived the right to have the jury consider the statements only for this limited purpose by failing to request an instruction and by stating that the charge was entirely satisfactory.

I

THE DECLARATION MADE BY THE DECEASED THAT "DR. SHEPARD HAS POISONED ME" WAS COMPETENT AS A DYING DECLARATION

While the trial Judge, when admitting the declaration made by the deceased that "Dr. Shepard has poisoned me," did not say upon what ground he was admitting it, yet the record shows that the court admitted it as a dying declaration because the foundation was laid at that time for its admis-

[3] The material portions of the testimony of Sergeant Gresser and Nurse Brown with reference to these conversations is set forth in the defendant's supplemental brief. See Pages 3–5 for testimony of Sergeant Gresser; pages 7–11 for testimony of Nurse Brown.

sion as a dying declaration. We think it was competent as a dying declaration. While the question is not free from doubt, we are of the opinion that the Circuit Court of Appeals was in error in holding that it was not competent as a dying declaration, on the ground that there was no evidence that she believed death was impending or about to ensue, though she believed she would not recover.

The majority of the Circuit Court of Appeals, in holding that the statement was not competent as a dying declaration, put their ruling on the ground that "there is no evidence that she believed death was impending or about to ensue." (R. 598.) We are of the opinion that the evidence shows that she believed death was impending.

If the court below meant by "impending" that the belief must be that death is going to follow immediately, then we submit that this is not the proper test. In the brief of the defendant filed in this Court, the defendant takes this position.

We think the better rule is that the declarant must believe that death is impending in the sense that it is not distant—it is not necessary that he believe that he is going to die immediately, but he must have had no expectation of surviving the injury.

The test is whether all hope of life has been abandoned so that the person making the statement believes death is certain and impending. If the statement is made at a time when the deceased has a hopeless expectation of death, that is, the deceased

has abandoned all hope of living, then the declaration is competent as a dying declaration.

We submit that the evidence showed that Mrs. Shepard believed her death was certain and impending at the time the statement was made. She said she was not going to get well; that she was going to die. In what stronger words could she have expressed her belief as to the certainty of death and that it was impending? She then said her husband had poisoned her. It cannot be successfully argued that the declarant must state that she believes she is going to die immediately or in any specified time. She knew she had been poisoned and the uncontradicted evidence shows that she was stricken suddenly ill, and that for a day or two and just prior to making the statement to the nurse, she had been suddenly rendered blind, the pupils of her eyes were widely dilated, there was no reaction to light, she was very ill and delirious. Knowing that she had been poisoned and having been for a day or two in this condition, may we not conclude when she said she was not going to get well and was going to die, that she not only believed death was certain but was impending, though she could not know just how long it would take the poison to do its deadly work. The trial Judge who had to pass upon the competency of the statement as a dying declaration was, we submit, justified in holding that it was competent, because the evidence showed that she believed death was

certain and impending, and that she had a hopeless expectation of death and had abandoned all hope of living.

"No rule can here be laid down. The circumstances of each case will show whether the requisite consciousness existed; and it is poor policy to disturb the ruling of the trial judge upon the meaning of these circumstances." Wigmore, *Evidence* (2d ed.), § 1442.

In *Mattox* v. *United States,* 146 U.S. 140, 151, this Court said:

> Dying declarations are admissible on a trial for murder as to the fact of the homicide and the person by whom it was committed * * * * * * But it must be shown by the party offering them in evidence that they were made under a sense of impending death. This may be made to appear from what the injured person said; or from the nature and extent of the wounds inflicted, being obviously such that he must have felt or known that he could not survive; as well as from his conduct at the time and the communications, if any, made to him by his medical advisers, if assented to or understandingly acquiesced in by him.

The Court further said (pp. 151–152).

> In *Regina* v. *Perkins,* 9 C. & P. 395, the deceased received a severe wound from a gun loaded with shot, of which wound he died at five o'clock the next morning. On the evening of the day on which he was wounded, he was told by a surgeon that he could not

> recover, made no reply, but appeared dejected. It was held by all the judges of England that a declaration made by him at that time was receivable in evidence on the trial of a person for killing him, as being a declaration *in articulo mortis.*

When this case was again before this Court (156 U.S. 237) Mr. Justice Brown speaking for the Court, said (p. 244):

> They [dying declarations] are admitted not in conformity with any general rule regarding the admission of testimony, but as an exception to such rules, simply from the necessities of the case, and to prevent a manifest failure of justice. As was said by the Chief Justice when this case was here upon the first writ of error, (146 U.S. 140, 152,) the sense of impending death is presumed to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath.

In *Carver* v. *United States,* 160 U.S. 553, it appeared that the fatal wound was inflicted on March 25, 1895, and death occurred May 19, 1895. A declaration in writing in respect of the circumstances attendant upon the commission of the act, made by the deceased March 27, 1895, was admitted in evidence, against objection, as made under a sense of impending death. The testimony of the clerk of the court (Wheeler) to the effect that the deceased, after she was brought to Fort Smith, on April 14, 1895, said that her former statement was true, was

admitted subject to an exception because no proper foundation was laid for its admission.

The Court said (p. 555):

> The deceased received the fatal wound March 25, and her statement of March 27, 1895, was admitted as a dying declaration. The interview with Wheeler was on or after April 14, 1895, and whether she then spoke under the admonition of her approaching end or anticipated recovery does not appear.
>
> It has been held that a declaration is admissible if made while hope lingers, if it is afterwards ratified when hope is gone, *Reg.* v. *Steele,* 12 Cox C.C. 168, or if made when the person is without hope, though afterwards he regains confidence. *State* v. *Tilghman,* 11 Ired. Law, 513; *Swisher* v. *Commonwealth,* 26 Grattan, 963; 1 Greenl. Ev. (15th ed.) § 158, note *a.* But the repetition of a dying declaration cannot itself be admitted as a reiteration of the alleged facts if made when hope has been regained. * * * *

In *State* v. *Tilghman,* 11 Ired. Law 513, the North Carolina Supreme Court said (p. 551):

> It is not necessary, that the person should be *in articulo mortis,* (the very act of dying); it is sufficient if he be under the apprehension of impending dissolution * * *.

When the *Carver* case was before this Court on a second appeal (164 U.S. 694), the Court said (pp. 695, 697):

> Dying declarations are an exception to the general rule that only sworn testimony can

> be received, the fear of impending death being assumed to be as powerful an incentive to truth as the obligation of an oath. * * *
>
> * * * * * *
>
> They are only received when the court is satisfied that the witness was fully aware of the fact that his recovery was impossible, and in this particular the requirement of the law is very stringent. * * *

In a note in 86 American State Reports 660, it is said:

> But while he must believe that death is impending in the sense that it is not distant: *Kilpatrick* v. *Commonwealth,* 31 Pa. St. 198; it is sufficient if he believes it to be approaching and certain, and the better holding is that he need not believe that he would die immediately: *Dunn* v. *State,* 2 Ark. 229, 35 Am. Dec. 54; *State* v. *Sadler,* 51 La. Ann. 1397, 26 South. 390; *State* v. *Keenan,* 38 La. Ann. 660; *State* v. *Newhouse,* 39 La. Ann. 862, 2 South. 799; *State* v. *Nash,* 7 Iowa, 347. As was said in *State* v. *Sullivan,* 20 R.I. 114, 37 Atl. 673, it is only necessary that the declarant should have had no expectation of surviving the injury inflicted by the defendant.

In Ruling Case Law, Volume 1, page 538, it is said:

> While the rules concerning the admissibility of dying declarations require that such declarations, to be admissible, must be made *in extremis,* it is not necessary that the de-

> clarant should apprehend immediate and instant dissolution. It is sufficient if he apprehends it to be impending and certain. In other words, the true test is whether all hope of life has been abandoned so that the person making the statement believes that death must follow. And the rule requiring that the declarations, to be admissible, must have been made while the declarant was in extremis does not mean that they must have been made while he was literally breathing his last; the rule is satisfied when it is shown that he died as the result of the injury from which he was suffering at the time when they were made. Hence it is not necessary to the admission of dying declarations that the declarant should have indicated that he believed that he would die within a definite time. It is enough that he was conscious of impending and certain death, and that he did die soon after making the declarations, as it is the impression of impending death, and not the rapid succession of death in point of fact, which renders the declarations admissible.

A number of cases are cited in support of the text.

In *State* v. *Moore*, 165 La. 163, 164, the court said:

> * * * it was immaterial that the deceased might have believed that he would survive until next morning, for "it is not necessary to prove expressions implying ap-

> prehension of *immediate* danger, *if it be clear that the party does not expect to survive the injury,* which may be collected from the general circumstances of his condition. [Italics ours.]" *State* v. *Sadler,* 51 La. Ann. 1397, 1412, 26 So. 390, 396, citing Wharton's Crim. Ev. § 261; *State* v. *Newhouse,* 39 La. Ann. 862, 2 So. 799; *State* v. *Keenan,* 38 La. Ann. 660.

In *State* v. *Sullivan,* 20 R.I. 114, the trial court, in ruling upon the admissibility of the deceased's statement, had said that "To make it admissible the man should have apprehended *immediate* death" (italics ours), but the Supreme Court of Rhode Island said (p. 119):

> This was even more favorable to the defendant than he was entitled to, because it was not necessary that the deceased should have apprehended *immediate* death in order to render his declarations admissible; *but only that he had no expectation of surviving the injury inflicted by the defendant.* Am. & Eng. Ency. L. vol. 9, pp. 679–82 and cases cited. (Last italics ours.)

See also *Evans* v. *State,* 58 Ark. 47, 54; *Hunter* v. *State,* 54 Tex. Crim. Rep. 224, 229; *Evans* v. *State,* 209 Ala. 563, 564.

The English authorities also support the view that the declarant need not apprehend immediate death. An interesting discussion of this question is in *Rex* v. *Perry* [1909], 2 K.B. 697 (also reported

in 2 Cr. App. Rep. 267), where the Court of Criminal Appeal said:

> The expression "at the point of death" which is there used [in *Rex* v. *Woodcock*, 1 Leach C.C. 500] has given rise to some misapprehension, and in *Reg.* v. *Osman* Lush L.J. said that there must be a settled hopeless expectation of "immediate death." We are of opinion that the presence or absence of expectation on the part of the declarant of immediate death is not the true test as to whether a statement as to the cause of death is admissible or not. Death must be imminent, but the material point is that the statement must be made when every hope of life has gone from the person making the statement. We think that that principle has been recognized in the later cases, to one or two of which we desire to call attention. In *Reg.* v. *Peel* Willes J. said: "It must be proved that the man was dying, and there must be a settled hopeless expectation of death in the declarant." That sentence expresses in very clear and crisp language the rule which I have been trying to explain. In *Reg.* v. *Gloster* Charles J., after examining the cases and citing *Rex* v. *Woodcock*, *Reg.* v. *Peel*, and *Reg.* v. *Osman* (where Lush L.J. used the expression "immediate death"), and after expressing his view that the word "immediate" might be misunderstood, said: "The whole of the facts must be looked at from first to last; and I may say before I refer to the evidence in detail that it goes no further than this: that

the woman thought that she was dying, thought that she would not recover, but in my judgment—and it is a most difficult thing to form a judgment of what was passing through the mind of this unfortunate woman—she did not entirely give up hope. And unless I can come to the conclusion that every hope was extinguished and gone I cannot admit the statement." It is also desirable to read a passage in the earlier part of the judgment in which Charles J. referred to the reasons why he differed from Lush L.J. He said: "In the latest case of all (*Reg.* v. *Osman*) Lush L.J. lays down the principle in these terms: 'A dying declaration is admitted in evidence because it is presumed that no person who is immediately going into the presence of his Maker, will do so with a lie on his lips. But the person making the declaration must entertain a settled hopeless expectation of immediate death. If he thinks he will die to-morrow it will not do.' That is the judgment of Willes J. with this addition, that Lush L.J. inserts the word 'immediate' before death, and goes on to say: 'If he thinks he will die to-morrow it will not do.' With the greatest deference to the latter very learned judge I would rather prefer to adopt the language of Willes J. and say that the declarant must be under a 'settled hopeless expectation of death.' 'Immediate death' must be construed in the sense of death impending, not on the instant, but within a very very short distance indeed. These are the principles

that have been laid down and are to guide me in the exercise of my judgment." In other words the test is whether all hope of life has been abandoned so that the person making the statement thinks that death must follow. In our opinion that is the true principle.

* * * * *

We are of opinion that the right view is that in determining whether a declaration is admissible in evidence the judge at the trial ought to consider whether the death of the deceased was imminent at the time the declaration was made and to determine from the language used by the deceased whether the statement was made at a time when the deceased had "a settled hopeless expectation of death." In the present case, if the expression "I shall go" is taken alone, it might mean I shall die some day; but, taking into consideration the whole sentence, we concur with the opinion of Lawrance J. that the statement was made by the deceased with the hopeless expectation of death. By the expression "hopeless expectation of death" I mean that the deceased had abandoned all hope of living. The statement is therefore admissible as a dying declaration made by her. * * *

See also *Rex* v. *Austin* [1912], 8 Cr. App. Rep. 27.

The fact that Mrs. Shepard did not die for some days after she made the dying declaration, does not render it incompetent. In the *Carver* case the fatal wound was inflicted on March 25, the dying

declaration which this Court held admissible was made on March 27, but death did not occur until May 19. In other cases also declarations have been admitted where the period of survival was considerably longer than in the instant case. *State* v. *Crane,* 120 N.C. 601 (5 months); *Boulden* v. *State,* 102 Ala. 78 (2 months); *State* v. *Robertson,* 162 La. 641 (2 months); *Walker* v. *State,* 88 Tex. Crim. Rep. 389 (6 weeks); *State* v. *Hall,* 134 S.C. 361 (33 days); *Jackson* v. *Commonwealth,* 189 Ky. 68 (27 days).

There can hardly be any doubt, in view of the testimony of Mrs. Shepard's nurse, that the deceased made the statement under the belief that death was a certainty, and that there was no hope of recovery. The nurse testified that in the conversation in which the statement was made, Mrs. Shepard said "she was not going to get well", and that "she was going to die". "Afterward and at different times," according to the nurse, Mrs. Shepard repeated the statement that she was going to die, and at no time did she express any idea to the nurse that she was going to get well. (R. 563.) Witnesses for the defense had also previously testified as to similar statements. (R. 486, 497–498.)

While one of the doctors who attended Mrs. Shepard during her last illness testified that he saw Mrs. Shepard on May 21, 1929, the day before her statement to nurse Brown was made, and that it was his impression from her general condition that "she was not dangerously ill at that time," he also

stated that he did not have "the slightest idea what was the matter with her" (R. 63), and it does not appear that he communicated to Mrs. Shepard his impression of her condition. The important factor is not what someone else may think of the declarant's condition, but what he, himself, thinks of his condition. See *Mattox* v. *United States,* 146 U.S. 140, 152; *Commonwealth* v. *Lockett,* 291 Pa. 319.

If either the majority or the dissenting judge below considered the statement of the deceased to Nurse Brown defective as a dying declaration on any other ground than that already discussed, they did not indicate it in their opinions. Moreover, the majority was careful to state that the declaration of the deceased to Sergeant Gresser was not admissible as a dying declaration for several reasons.

It would obviously be impossible to exhaust all the subjects of controversy which may arise in connection with the admissibility of a statement whose introduction in evidence as a dying declaration is being defended. We have considered one of the grounds which would affect the admissibility of the statement to Nurse Brown as a dying declaration; we think the statement also meets the various other limitations which have been prescribed by the authorities. The statement was made by Mrs. Shepard on her death bed; its introduction in evidence was sought in a prosecution for felonious homicide in which the death of the one who made the declara-

tion was in question (*Taylor* v. *Commonwealth*, 122 Va. 886; *Holland* v. *State*, 126 Ark. 332); it concerned only the facts immediately attending the act or at least one of the acts[4] which resulted in Mrs. Shepard's death (*Carver* v. *United States*, 160 U.S. 553, 554, *supra*; *State* v. *O'Shea*, 60 Kan. 772; nothing intervened, so far as the record shows, to prevent Mrs. Shepard from making as full a statement as she desired to make; in other words, her statement was complete and not fragmentary (*State* v. *Patterson*, 45 Vt. 308, 313; *State* v. *Nettlebush*, 20 Iowa 257); and the testimony does not disclose that in making the statement the declarant was motivated by any such feeling of hatred or revenge as would destroy the guarantee of trustworthiness.[5] *Reeves* v. *State*, 106 Miss. 885.

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[4] There was medical testimony indicating that there may have been several administrations of poison (R. 70, 127). Mrs. Shepard's statement refers to an administration of poison on the night of May 20, 1929, the night she was taken ill. The evidence does not disclose just when the subsequent administration occurred.

[5] There is nothing in the record, so far as we can find, to indicate that Mrs. Shepard had any knowledge of the carefully concealed affection of her husband for another woman. There does not appear to be any basis therefore for the statement of the dissenting judge in his second opinion that Mrs. Shepard "knew that she had lost the affection of her husband." (R. 641.) In fact the defendant, when taken into custody, expressly stated to agents of the Department of Justice in a stenographically reported interview that he and his wife had loved each other; that they had never had any trouble of any consequence; that they both had been true to

The statement by the deceased that her husband poisoned her was a statement of a fact and not her opinion

While the Circuit Court of Appeals held (R. 598), we think rightly, that the statement of the deceased to Sergeant Gresser that "she believed she was being poisoned" was a mere statement of opinion and not one of fact, it made no such holding with reference to the declaration of the deceased to Nurse Brown that "Dr. Shepard has poisoned me." Further, although the defendant moved to strike out the former statement on the ground referred to (R. 540), no similar motion was made in respect of the latter statement. (R. 565.)

The defendant now contends that Mrs. Shepard's declaration to the nurse was not a statement of a fact but an opinion or conclusion. We do not dispute the general proposition that only the declarant's statements of fact and not his opinions or conclusions are admissible. (See numerous cases cited in Wigmore, *Evidence*, 2d ed. (§ 1447). The difficulty lies in the application of the principle. Some of the decisions have applied the Opinion Rule to dying declarations with the same degree of strictness as in the ordinary case where the witness is available to make a complete exposition of the facts, thereby

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each other; that he never told anybody that he or his wife ever considered divorce because neither had planned any such thing; and that his home life had been entirely normal (R. 323–324).

rendering any inference by him unnecessary.[6] Other courts recognize the peculiar situation applicable in the case of dying declarations and make the rule serve its rational purpose, the exclusion of statements founded wholly on speculation or conjecture.

Of course, in determining whether a dying statement is one of fact or merely one of opinion, not only the statement itself but the other evidence must be considered, but it has also been ruled that if it does not definitely appear either from the statement or the evidence that the statement is one of opinion, it should be admitted, leaving to the jury the question of the weight to be accorded the statement. *Jones* v. *State,* 52 Ark. 345, 347; *State* v. *Clemons,* 51 Iowa 274; *State* v. *Arnold,* 13 Ired. Law (N.C.) 184; *Lipscomb* v. *State,* 75 Miss. 555. The decision of the trial judge should be sustained unless clearly unsupported by the evidence. *Newberry* v. *State,* 68 Ark. 355, 359; *Klehn* v. *Territory,* 1 Wash. 584.

There could seem to be no question that the statement of Mrs. Shepard that her husband

[6] In connection with his survey of the cases, Wigmore states (2d ed., § 1447) that the Opinion Rule is by some courts applied in connection with dying declarations "with more than the ordinary absurdity of results found in the use of that rule; some of the rulings, in their pedantic technicality, are a scandal to any system of Evidence supposed to be based on reason and common sense". "Are not some of these exclusion-rulings equal to any of the medieval witch-formulas and conjurers' spells, as a means of getting at the truth"?

poisoned her was on its face a statement of fact. As was said of a similar expression in *Shenkenberger* v. *State,* 154 Ind. 630, 639:

> Such expression is no more the statement of an opinion than are the declarations, "He shot me," "He murdered me," "He butchered me," "He cut me," which have been held admissible in many cases. * * *

And, to use the language of another case, "Any process of reasoning which seeks to distinguish between the statement, "Dr. Lipscomb poisoned me with a capsule he gave me tonight," and "Dr. Lipscomb killed me or shot me," seems to be a refinement * * * too uncertain and visionary to serve in the practical administration of justice, * * *." *Lipscomb* v. *State,* 75 Miss. 559, 603, *supra.*

Not only was Mrs. Shepard's statement on its face a statement of fact, but we believe that the other evidence discloses definitely that it was not a product of guess or fancy but had a substantial basis. The record shows that prior to the introduction of Mrs. Shepard's statement, a Major DuFrenne, one of the doctors who attended Mrs. Shepard during her last illness, had testified as follows (R. 339):

> I had a conversation with Major Shepard the day of the funeral as to how his wife took sick.
>
> Q. Tell the jury what it was.
>
> A. Major Shepard called me to his quarters the day of the funeral, and he told me

> that Mrs. Shepard had been downtown the day of her illness, and, when she came home, she looked very tired, and he said, in substance, like this: he said "Dear, you certainly are tired, are you not?" and he said, "Would you not like a ginger ale highball?" I do not know what Mrs. Shepard said, but anyway, Major Shepard said, he fixed her a drink at that time.

This testimony was corroborated by the testimony of Kathryn McCoskey, a sister-in-law of the deceased. She testified as follows (R. 339):

> When I arrived at Junction City, I had a conversation with Major Shepard about how Mrs. Shepard took sick.
>
> A. (Continuing) He told me that, the day of her illness, on the 20th, she came back from Junction City, she was very tired, and he asked her if she would like a highball, and she said she would, and he fixed her a drink, and she lay down on the couch, and he went in the other room, and heard a crash, and he came in, and she was picking things out of the air, and she was delirious.

Although the defendant when he took the stand denied that he had fixed Mrs. Shepard a drink just before she was taken ill (R. 422), it is significant that neither of the above witnesses was cross-examined by the defendant with reference to this matter and that the record does not disclose any motive for either witness to tell anything but the truth.

It is, therefore, evident that one of the facts that Mrs. Shepard knew when she made the statement

that her husband had poisoned her was that the accused had fixed her a drink before she became ill. The other facts which she knew are disclosed by the testimony of Nurse Brown (R. 564–566). They are essentially these: On the night she became ill Mrs. Shepard took a drink out of a bottle which the testimony indicates was customarily kept on a closet shelf in the defendant's room. It did not taste good. It tasted altogether different from a previous time when she had taken a drink out of the same bottle. She also knew that there could be little liquor remaining in the bottle, because she had remarked to Major Shepard when she took the preceding drink that there was only enough left for one more drink. The nurse testified that there was only about a tablespoonful of liquor in the bottle. Mrs. Shepard also knew that she became violently ill after she took her last drink out of this bottle. Further, as there was no testimony to indicate that anyone beside the defendant was with her at the time she took this drink, a fact which could have been easily proved by the defendant, it must also have been evident to Mrs. Shepard that if she did not poison the drink the defendant must have done so. Coupled with these facts is the fact that the medical testimony showed so conclusively that Mrs. Shepard's death was caused by the administration of poison that that fact, according to the majority opinion in the Circuit Court of Ap-

peals, was practically conceded in that court. (R. 597.)

While the testimony recited does not supply all the details with reference to Mrs. Shepard's poisoning, we believe that the trial judge would not have been justified in concluding upon the evidence before him that Mrs. Shepard's statement that her husband had poisoned her should be excluded from the jury as one based merely on speculation or conjecture. If such a statement, based on facts within the knowledge of the declarant like those recited, may be regarded as a statement of opinion rather than one of fact, it is hard to imagine a dying declaration in a poisoning case which would survive the Opinion Rule.

While there are some decisions supporting the view that a statement such as that of Mrs. Shepard's is a statement of opinion (*Berry* v. *State,* 63 Ark. 382; *Commonwealth* v. *Griffith,* 149 Ky. 405; *Mathedy* v. *Commonwealth,* 14 Ky. L.Rep. 182), the majority of the decisions are the other way. *Shenkenberger* v. *State,* 154 Ind. 630, *supra; State* v. *Kuhn,* 117 Iowa 216; *Cook* v. *State,* 90 Tex. Crim. Rep. 424, 426; *Rice* v. *State,* 49 Tex. Crim. Rep. 569; s.c. 54 Tex. Crim. Rep. 149; *Fults* v. *State,* 83 Tex. Crim. Rep. 602, 604; *Lipscomb* v. *State,* 75 Miss. 559, *supra.* See also *Simons* v. *People,* 150 Ill. 66, 73; *Puryear* v. *Commonwealth,* 83 Va. 51, 53; *People* v. *Green,* 1 Denio 614 (N.Y.); *State* v. *Ferrell,* 12 Richardson 321 (S.C.); *Copeland* v. *State,* 58 Fla. 26, 29.

Mrs. Shepard was mentally competent at the time she made the statement that her husband had poisoned her

It is also contended by the defendant at some length that the statement of the deceased to Nurse Brown was untrustworthy because the evidence shows that the declarant was mentally incompetent at the time it was made. We submit that if the evidence be considered as a whole it is not susceptible of this construction. Mrs. Shepard's statement to Nurse Brown was, according to her testimony, made on the second day she was on the case. (R. 562.) Mrs. Shepard was taken ill on the evening of May 20, 1929. As the nurse arrived on the case shortly after 12 o'clock that evening, it is evident that the declaration referred to was made on May 22.[7] At the very beginning of her illness it is undoubtedly true that Mrs. Shepard was delirious, incoherent, mentally confused, and in a state of collapse, but, according to most of the testimony, this condition rapidly cleared up. While one of the doctors who attended Mrs. Shepard indicated that the condition of mental confusion continued to some extent at least for about a week (R. 356), another doctor, who was called in on the morning of May 21st, testified that even then Mrs. Shepard was recovering from the state of collapse which marked the commencement of her illness on the night before. While there was still a slight

[7] See footnote 2.

mental confusion, it "could be penetrated, that is, she (Mrs. Shepard) would answer intelligently if you repeated your questions." (R. 63.) The mental condition, according to Nurse Brown, cleared up in "just a few days" and Mrs. Shepard was then as intelligent as anyone. (R. 137–138.) The most significant testimony, however, is the testimony which this nurse later gave in relating the conversation in which Mrs. Shepard made the statement that her husband had poisoned her. This was the only testimony which was addressed specifically to Mrs. Shepard's mental condition at that time. Nurse Brown testified that Mrs. Shepard's mind was then normal, she answered questions intelligently, and was perfectly rational. (R. 562–563.) Her testimony is amply corroborated by the intelligent character of the conversation between the nurse and Mrs. Shepard as revealed by the record. We think there was ample evidence to justify the court in concluding that Mrs. Shepard was mentally competent when she made her statement. It is well settled that the trial judge's decision as to the competency of a witness should not be disturbed unless clearly wrong. See *New York Evening Post Co.* v. *Chaloner,* 265 Fed. 204 (C.C.A. 2d); *District of Columbia* v. *Armes,* 107 U.S. 519.

The defendant stresses the fact that Nurse Brown failed for some time to tell anyone of Mrs. Shepard's statement that her husband had poisoned

her, but of course that did not affect the competency of the evidence but merely its credibility.

II

THE ADMISSION OF THE STATEMENT OF THE DECEASED THAT "SHE BELIEVED SHE WAS BEING POISONED" WAS NOT PREJUDICIAL

Whether competent or not, we contend that the defendant was not in any wise prejudiced by the admission of the statement of the deceased to Sergeant Gresser that "she believed she was being poisoned." The Circuit Court of Appeals held that this declaration was not a statement of fact and was not admissible as a dying declaration, but was admissible to show a state of mind not disposed toward suicide.

According to the majority opinion, it was practically conceded in the Circuit Court of Appeals that the death of Mrs. Shepard was due to poisoning. (R. 597.) The statement to Sergeant Gresser was, at most, a mere expression of the deceased's belief that she was poisoned. Neither the statement itself nor any of the testimony of Sergeant Gresser with reference to the conversation in which the statement was made connected the defendant, either directly or indirectly, with the statement. In view of the fact that it was practically conceded that Mrs. Shepard's death was due to poisoning and of the direct accusation made by the deceased to Nurse Brown that her husband had poisoned her, there was obviously no damage to the defendant

from the Gresser statement. If there was error in the admission of this statement, we submit that it did not operate to the prejudice of the defendant, and that it should be disregarded as a technical error not warranting reversal. Section 269 of the Judicial Code, as amended (U.S.C., Title 28, Sec. 391); Section 1025, R.S. (U.S.C., Title 18, Sec. 556); cf. *Hagner* v. *United States*, 285 U.S. 427.

III

WERE THE DECLARATIONS OF THE DECEASED AS TESTIFIED TO BY WITNESSES BROWN AND GRESSER COMPETENT AS TENDING TO SHOW THE STATE OF MIND OF THE DECEASED TO REBUT THE THEORY OF SUICIDE, AND WAS IT ERROR TO FAIL TO RESTRICT THE EVIDENCE TO THAT PURPOSE?

If, as we contend, the declaration made to the nurse was admissible as a dying declaration and the admission of the statement made to Gresser was not prejudicial, then this question becomes immaterial.

This question was the subject of extended discussion in the Circuit Court of Appeals. We have found nothing of substantial value to add to this discussion.

IV

THE ACTION OF THE COURT IN EXCUSING MEN ON THE JURY PANEL WHO ADMITTED THEY HAD READ A THREE-COLUMN ARTICLE PRINTED IN A NEWSPAPER TWO DAYS BEFORE THE TRIAL, WHICH PURPORTED TO EMANATE FROM THE DEFENDANT, IS NOT GROUND FOR A NEW TRIAL

The defendant contends that the trial court committed reversible error in excusing ten prospective

jurors who had read a three- or four-column newspaper article which appeared two days before the trial in the Kansas City Star, and which purported to emanate from the defendant and to be his statement of the facts of the case. This article is not included in the record, but one of the jurors who was examined by the court, as well as by counsel for both parties, testified that he thought it was a statement coming directly from the defendant about the details of the case, and that a person would consider the statement in determining the weight to be given the Government's testimony (R. 39–40). The other excluded jurors were examined solely by the court. Requests by the defendant to question several of the jurors were denied. The examination of the jurors in question appears at R. 38–49. At the conclusion of the examination the defendant moved to quash the entire panel (R. 49–50).

The defendant does not deny that the examination and acceptance or exclusion of jurors are matters entrusted to the sound discretion of the trial court; but contends, primarily, that that discretion was abused in the instant case because the trial court excluded the jurors without finding that they had gathered from reading the newspaper article an opinion favoring the defendant which was incapable of being removed by the evidence.

The Government as well as the defendant is, of course, entitled to a fair trial. The view of the trial court was that such a fair trial would not follow in the instant case if the defendant was

permitted to "put his statement in a newspaper and get it to all the jurors, and ask those jurors to sit in this case." (R. 45.) A juror should stand absolutely impartially between the parties. As this Court said in *Connors* v. *United States,* 158 U.S. 408, 413, 414, quoting from an earlier opinion by Chief Justice Marshall in *Mima Queen* v. *Hepburn,* 7 Cranch 290, 297:

> It is certainly much to be desired that jurors should enter upon their duties with minds entirely free from every prejudice. Perhaps on general and public questions it is scarcely possible to avoid receiving some prepossessions, and where a private right depends on such a question the difficulty of obtaining jurors whose minds are entirely uninfluenced by opinions previously formed is undoubtedly considerable. Yet they ought to be superior to every exception, they ought to stand perfectly indifferent between the parties, and although the bias which was acknowledged in this case might not perhaps have been so strong as to render it positively improper to allow the juror to be sworn on the jury, yet it was desirable to submit the case to those who felt no bias either way, and therefore the court exercised a sound discretion in not permitting him to be sworn.

So, in the instant case, assuming that it might not have been entirely improper to have permitted the jurors in question to have been sworn, it certainly cannot be considered an abuse of the trial court's discretion to exclude jurors who have been

subjected to an influence in favor of the defendant which the jurors would naturally assume he had created. We submit that the defendant has failed to make such a showing of abuse of discretion as would entitle him to a new trial. As was said by this Court in *Holt* v. *United States,* 218 U.S. 245, 248:

> The finding of the trial court upon the strength of the juryman's opinions and his partiality or impartiality ought not to be set aside by a reviewing court unless the error is manifest, which it is far from being in this case. See *Reynolds* v. *United States,* 98 U.S. 145. *Hopt* v. *Utah,* 120 U.S. 430. *Spies* v. *Illinois,* 123 U.S. 131. * * *

See also *Assaid* v. *United States,* 10 F. (2d) 752, 754 (C.C.A. 4th); *Remus* v. *United States,* 291 Fed. 501, 507 (C.C.A. 6th), certiorari denied, 263 U.S. 717.

Moreover, as the newspaper article in question does not appear in the record, it is impossible to determine its effect. The trial court had the article before it and was in a position to know just what influence it would have upon a prospective juror. Under the circumstances, the case is peculiarly one in which the discretion of the trial judge should be considered final.

In any event, we cannot see how the defendant was in any wise prejudiced by the exclusion of the jurors in question. He makes no contention that the jury which tried him was not a fair and im-

partial jury. He was, of course, entitled to nothing more. As was said by this Court in *Howard* v. *Kentucky*, 200 U.S. 164, 173–174:

> Nor can we say that the discharge of Alexander took from the other jurors who had been chosen their competency to try the case or to give to plaintiff in error the right to a new panel. In *Hayes* v. *Missouri*, 120 U.S. 68, it was said "the accused cannot complain if he is still tried by an impartial jury. He can demand nothing more. *Northern Pacific Railroad* v. *Herbert*, 116 U.S. 642. The right to challenge is the right to reject, not to select a juror. If from those who remain an impartial jury is obtained, the constitutional right of the accused is maintained." *Brown* v. *New Jersey*, 175 U.S. 172.

V

THE CONTENTION THAT THE TRIAL COURT IN ITS CHARGE TO THE JURY MADE CERTAIN UNFAIR COMMENTS ON THE EVIDENCE IS WITHOUT MERIT.

Defendant contends that reversible error resulted because the court in its charge reviewed the evidence for the Government in more detail than that favorable to the defense. As explained by the court below, it was but natural that the trial court should review the evidence for the Government at greater length because of the fact that the Government was required to sustain its burden of proof by circumstantial evidence. (R. 600.) It should be pointed out, however, that the trial court was careful in its charge frequently to admonish the jury

that it should consider and weigh all the testimony and that whatever comments the court should make upon the evidence were not in any wise binding upon the jury. (See R. 576, 578, 581, 583, 588, 589.) Consequently, there was no basis upon which to predicate a claim of reversible error. As was said by this Court in *Allis* v. *United States,* 155 U.S. 117, 124:

> So far as respects the complaint that the court stated part of the testimony on a certain point without stating all, we know of no rule that compels a court to recapitulate all the items of the evidence, nor even all bearing upon a single question. There was no intimation that all the testimony bearing upon any particular point was stated. On the contrary, the plain declaration was that there was other testimony than that mentioned, and the jury were admonished to give that not mentioned as full and careful consideration as that mentioned.

See also *Nudd* v. *Burrows,* 91 U.S. 426, 439; *Wiborg* v. *United States,* 163 U.S. 632. The charge contained no appeal to prejudice or passion and, considered as a whole, was eminently fair and considerate of the rights of the defendant. Cf. *Starr* v. *United States,* 153 U.S. 614.

The defendant also contends that the trial court in its charge to the jury commented unfairly upon the evidence. The instances cited are, we submit, devoid of merit. In commenting upon the evi-

dence, for example, the trial court stated that "From that time on until the date this murder is alleged to have been committed [the defendant], remained in the Medical Corps of the United States Army," etc. (R. 583.) The defendant says that this indicated to the jury that its proper finding on the evidence was murder. Obviously, the trial court was doing no more than repeating the charge made by the indictment. In any event, considering the charge as a whole, the jury could not have been misled, for prior to the comment of the court of which complaint is made, the following instructions were given (R. 577, 578, 581, 583):

> Now, the finding of this indictment by the grand jury is no evidence of the guilt of the defendant. It is a legal charge against him of having committed that crime. To that charge he has pleaded not guilty, and that created the issue which you are called here to determine. * * *
>
> * * * * * *
>
> In your deliberations in the jury room you must not allow passion, prejudice or partiality to influence you in the slightest degree in deciding upon your verdict, but you must be guided by the law as given to you by the court and the evidence of witnesses given in your presence.
>
> The law presumes the defendant to be innocent of the charge made against him and this presumption of innocence continues to operate in his favor throughout the trial and

until the contrary is proven by the evidence and until each and every ingredient necessary to constitute the offense charged against him is proven by the evidence beyond a reasonable doubt.

* * * * *

The burden of proof rests upon the government to prove to your satisfaction beyond a reasonable doubt each and every ingredient of the offense charged in the indictment, and this burden of proof does not shift from the government to the defendant at all, in any phase of the case. The burden of proof rests upon the government to prove his guilt and not upon the defendant to prove his innocence.

* * * * *

Now, it is within the court's province to comment on the evidence, but whatever comments I make are in no way binding on you in your deliberations because, as I have heretofore stated, you are the exclusive judges of the credibility of the witnesses and the weight to be given to their testimony and whatever comments I make are made for whatever help they may be to you in deciding the issues in this case.

And following the remarks complained of the court instructed as follows (R. 588, 591):

If you do find that Zenana Shepard, the deceased, died from the effects of mercurial poisoning, then the question remains did the defendant, Charles A. Shepard, administer

this poison to her as he is charged with doing in this indictment?

In answering this question you will of course properly consider all of the evidence in this case. Circumstantial evidence of course is the only kind of evidence you have as to the administration of this mercury, if it was administered, and it is from that kind of evidence you will have to decide whether or not this defendant is guilty of administering this poison to the deceased, if it was administered.

* * * * *

It is your duty to consider these instructions as a whole. You should not pick out any part thereof and consider it singly and alone, but you should consider and construe each part in the light of and together with all the other instructions given, and so considered and construed they embody the law of the case. You are to consider the evidence as given to you from the witness stand and if counsel on either side, or if the court has in any way misquoted or misinterpreted the evidence you will disregard the misquotation and misinterpretation and rely entirely upon your recollection of the evidence as given to you on the witness stand.

Complaint is also made of the two questions the court told the jury they were called upon to solve, viz (R. 585):

Did this woman die of mercurial poisoning, and secondly,

> Did the defendant, Charles A. Shepard, administer the mercury to her as charged in the indictment?

It is claimed that the above statement precluded the jury from finding that she died from some other cause. This complaint overlooks the indictment charge, viz., that she died from mercury poisoning and that it was administered by defendant. (R. 1–2.) The questions stated by the court were therefore the sole questions to be determined by the jury. If the jury found that she did not die from mercurial poisoning, it was no function of theirs to determine the exact cause of death.

Moreover, it appears that the defendant not only did not take an exception to the charge but stated at the conclusion of the charge that he was "entirely satisfied with the instructions." (R. 574.) It is well settled that objections to a charge will not be reviewed unless exception is taken before the jury retires. This principle has become so well established that it has been embodied in the rules of this Court as well as those of practically all of the Circuit Courts of Appeals, including the court below. Rule 8 of this Court provides:

> No bill of exceptions shall be allowed on a general exception to the charge of the court to the jury in trials at common law. The party excepting shall be required *before the jury retires* to state distinctly the sev-

> eral matters of law in such charge to which he excepts; and no other exceptions to the charge shall be allowed by the court or inserted in a bill of exceptions. (Italics ours.)

The purpose of the rule is to give the trial court opportunity to correct the alleged error to which exception is taken. *Allis* v. *United States,* 155 U.S. 117, 112; *Burns* v. *United States,* 274 U.S. 328, 336. The rights of the defendant in the instant case were fully protected by the charge as given, and there is, we submit, no occasion for a relaxation of the general rule.

CONCLUSION

For the reasons stated above, we submit that the judgment below should be affirmed.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.
PAT MALLOY,
Assistant Attorney General.
HARRY S. RIDGELY,
W. MARVIN SMITH,
Attorneys.

OCTOBER, 1933.

U.S. GOVERNMENT PRINTING OFFICE: 1933

SUPREME COURT OF THE UNITED STATES.

No. 50.—October Term, 1933.

Charles A. Shepard, Petitioner, *vs.* The United States of America, Respondent.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[November 6, 1933.]

Mr. Justice Cardozo delivered the opinion of the Court.

The petitioner, Charles A. Shepard, a major in the medical corps of the United States army, has been convicted of the murder of his wife, Zenana Shepard, at Fort Riley, Kansas, a United States military reservation. The jury having qualified their verdict by adding thereto the words "without capital punishment" (18 U. S. C., § 567), the defendant was sentenced to imprisonment for life. The judgment of the United States District Court has been affirmed by the Circuit Court of Appeals for the Tenth Circuit, one of the judges of that court dissenting. 62 F. (2d) 683; 64 F. (2d) 641. A writ of certiorari brings the case here.

The crime is charged to have been committed by poisoning the victim with bichloride of mercury. The defendant was in love with another woman, and wished to make her his wife. There is circumstantial evidence to sustain a finding by the jury that to win himself his freedom he turned to poison and murder. Even so, guilt was contested and conflicting inferences are possible. The defendant asks us to hold that by the acceptance of incompetent evidence the scales were weighted to his prejudice and in the end to his undoing.

The evidence complained of was offered by the Government in rebuttal when the trial was nearly over. On May 22, 1929, there was a conversation in the absence of the defendant between Mrs. Shepard, then ill in bed, and Clara Brown, her nurse. The patient asked the nurse to go to the closet in the defendant's room and bring a bottle of whisky that would be found upon a shelf. When the bottle was produced, she said that this was the liquor she had

taken just before collapsing. She asked whether enough was left to make a test for the presence of poison, insisting that the smell and taste were strange. And then she added the words "Dr. Shepard has poisoned me."

The conversation was proved twice. After the first proof of it, the Government asked to strike it out, being doubtful of its competence, and this request was granted. A little later, however, the offer was renewed, the nurse having then testified to statements by Mrs. Shepard as to the prospect of recovery. "She said she was not going to get well; she was going to die." With the aid of this new evidence, the conversation already summarized was proved a second time. There was a timely challenge of the ruling.

She said, "Dr. Shepard has poisoned me." The admission of this declaration, if erroneous, was more than unsubstantial error. As to that the parties are agreed. The voice of the dead wife was heard in accusation of her husband, and the accusation was accepted as evidence of guilt. If the evidence was incompetent, the verdict may not stand.

1. Upon the hearing in this court the Government finds its main prop in the position that what was said by Mrs. Shepard was admissible as a dying declaration. This is manifestly the theory upon which it was offered and received. The prop, however, is a broken reed. To make out a dying declaration the declarant must have spoken without hope of recovery and in the shadow of impending death. The record furnishes no proof of that indispensable condition. So, indeed, it was ruled by all the judges of the court below, though the majority held the view that the testimony was competent for quite another purpose, which will be considered later on.

We have said that the declarant was not shown to have spoken without hope of recovery and in the shadow of impending death. Her illness began on May 20. She was found in a state of collapse, delirious, in pain, the pupils of her eyes dilated, and the retina suffused with blood. The conversation with the nurse occurred two days later. At that time her mind had cleared up, and her speech was rational and orderly. There was as yet no thought by any of her physicians that she was dangerously ill, still less that her case was hopeless. To all seeming she had greatly improved, and was moving forward to recovery. There had been no diag-

nosis of poison as the cause of her distress. Not till about a week afterwards was there a relapse, accompanied by an infection of the mouth, renewed congestion of the eyes, and later hemorrhages of the bowels. Death followed on June 15.

Nothing in the condition of the patient on May 22 gives fair support to the conclusion that hope had then been lost. She may have thought she was going to die and have said so to her nurse, but this was consistent with hope, which could not have been put aside without more to quench it. Indeed, a fortnight later, she said to one of her physicians, though her condition was then grave, "You will get me well, won't you?" Fear or even belief that illness will end in death will not avail of itself to make a dying declaration. There must be "a settled hopeless expectation" (*Willes, J. in Reg.* v. *Peel*, 2 F. & F. 21, 22) that death is near at hand, and what is said must have been spoken in the hush of its impending presence. *Mattox* v. *United States*, 146 U. S. 140, 151; *Carver* v. *United States*, 160 U. S. 553; 164 U. S. 694; *R.* v. *Perry*, [1909], 2 K. B. 697; *People* v. *Sarzano*, 212 N. Y. 231, 235; 3 Wigmore on Evidence, §§ 1440, 1441, 1442, collating the decisions. Despair of recovery may indeed be gathered from the circumstances if the facts support the inference. *Carver* v. *United States*, *supra*; Wigmore, Evidence, § 1442. There is no unyielding ritual of words to be spoken by the dying. Despair may even be gathered though the period of survival outruns the bounds of expectation. Wigmore, § 1441. What is decisive is the state of mind. Even so, the state of mind must be exhibited in the evidence, and not left to conjecture. The patient must have spoken with the consciousness of a swift and certain doom.

What was said by this patient was not spoken in that mood. There was no warning to her in the circumstances that her words would be repeated and accepted as those of a dying wife, charging murder to her husband, and charging it deliberately and solemnly as a fact within her knowledge. To the focus of that responsibility her mind was never brought. She spoke as one ill, giving voice to the beliefs and perhaps the conjectures of the moment. The liquor was to be tested, to see whether her beliefs were sound. She did not speak as one dying, announcing to the survivors a definitive conviction, a legacy of knowledge on which the world might act when she had gone.

The petitioner insists that the form of the declaration exhibits other defects that call for its exclusion, apart from the objection that death was not imminent and that hope was still alive. Homicide may not be imputed to a defendant on the basis of mere suspicions, though they are the suspicions of the dying. To let the declaration in, the inference must be permissible that there was knowledge or the opportunity for knowledge as to the acts that are declared. Wigmore, § 1445 (2). The argument is pressed upon us that knowledge and opportunity are excluded when the declaration in question is read in the setting of the circumstances. On the one side are such cases as *Berry* v. *State,* 63 Ark. 382; *State* v. *Wilks,* 278 Mo. 481; *State* v. *Williams,* 67 N. C. 12; *State* v. *Jefferson,* 125 N. C. 712; *Shaw* v. *People,* 3 Hun 272; 63 N. Y. 36; *Stewart* v. *Commonwealth,* 235 Ky. 670, 679; and *Commonwealth* v. *Griffith,* 149 Ky. 405; on the other, *Shenkenberger* v. *State,* 154 Ind. 630; *State* v. *Kuhn,* 117 Ia. 216, 228; *Fults* v. *State,* 83 Tex. Cr. 602; *Cook* v. *State,* 90 id. 424; cf. the cases cited in 11 A. L. R. 567, note, and 25 A. L. R. 1370, note. The form is not decisive, though it be that of a conclusion, a statement of the result with the antecedent steps omitted. Wigmore, § 1447. "He murdered me," does not cease to be competent as a dying declaration because in the statement of the act there is also an appraisal of the crime. *State* v. *Mace,* 118 N. C. 1244; *State* v. *Kuhn, supra.* One does not hold the dying to the observance of all the niceties of speech to which conformity is exacted from a witness on the stand. What is decisive is something deeper and more fundamental than any difference of form. The declaration is kept out if the setting of the occason satisfies the judge, or in reason ought to satisfy him, that the speaker is giving expression to suspicion or conjecture, and not to known facts. The difficulty is not so much in respect of the governing principle as in its application to varying and equivocal conditions. In this case, the ruling that there was a failure to make out the imminence of death and the abandonment of hope relieves us of the duty of determining whether it is a legitimate inference that there was the opportunity for knowledge. We leave that question open.

2. We pass to the question whether the statements to the nurse, though incompetent as dying declarations, were admissible on other grounds.

The Circuit Court of Appeals determined that they were. Witnesses for the defendant had testified to declarations by Mrs. Shepard which suggested a mind bent upon suicide, or at any rate were thought by the defendant to carry that suggestion. More than once before her illness she had stated in the hearing of these witnesses that she had no wish to live, and had nothing to live for, and on one occasion she added that she expected some day to make an end to her life. This testimony opened the door, so it is argued, to declarations in rebuttal that she had been poisoned by her husband. They were admissible, in that view, not as evidence of the truth of what was said, but as betokening a state of mind inconsistent with the presence of suicidal intent.

(a) The testimony was neither offered nor received for the strained and narrow purpose now suggested as legitimate. It was offered and received as proof of a dying declaration. What was said by Mrs. Shepard lying ill upon her death bed was to be weighed as if a like statement had been made upon the stand. The course of the trial makes this an inescapable conclusion. The Government withdrew the testimony when it was unaccompanied by proof that the declarant expected to die. Only when proof of her expectation had been supplied was the offer renewed and the testimony received again. For the reasons already considered, the proof was inadequate to show a consciousness of impending death and the abandonment of hope; but inadequate though it was, there can be no doubt of the purpose that it was understood to serve. There is no disguise of that purpose by counsel for the Government. They concede in all candor that Mrs. Shepard's accusation of her husband, when it was finally let in, was received upon the footing of a dying declaration, and not merely as indicative of the persistence of a will to live. Beyond question the jury considered it for the broader purpose, as the court intended that they should. A different situation would be here if we could fairly say in the light of the whole record that the purpose had been left at large, without identifying token. There would then be room for argument that demand should have been made for an explanatory ruling. Here the course of the trial put the defendant off his guard. The testimony was received by the trial judge and offered by the Government with the plain understanding that it was to be used for an illegitimate purpose, gravely prejudicial. A trial becomes unfair if testimony thus accepted may be

used in an appellate court as though admitted for a different purpose, unavowed and unsuspected. *People* v. *Zackowitz*, 254 N. Y. 192, 200. Such at all events is the result when the purpose in reserve is so obscure and artificial that it would be unlikely to occur to the minds of uninstructed jurors, and even if it did, would be swallowed up and lost in the one that was disclosed.

(b) Aside, however, from this objection, the accusatory declaration must have been rejected as evidence of a state of mind, though the purpose thus to limit it had been brought to light upon the trial. The defendant had tried to show by Mrs. Shepard's declarations to her friends that she had exhibited a weariness of life and a readiness to end it, the testimony giving plausibility to the hypothesis of suicide. Wigmore, § 1726; *Commonwealth* v. *Trefethen*, 157 Mass. 180. By the proof of these declarations evincing an unhappy state of mind the defendant opened the door to the offer by the Government of declarations evincing a different state of mind, declarations consistent with the persistence of a will to live. The defendant would have no grievance if the testimony in rebuttal had been narrowed to that point. What the Government put in evidence, however, was something very different. It did not use the declarations by Mrs. Shepard to prove her present thoughts and feelings, or even her thoughts and feelings in times past. It used the declarations as proof of an act committed by some one else, as evidence that she was dying of poison given by her husband. This fact, if fact it was, the Government was free to prove, but not by hearsay declarations. It will not do to say that the jury might accept the declarations for any light that they cast upon the existence of a vital urge, and reject them to the extent that they charged the death to some one else. Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds. It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. They have their source very often in considerations of administrative convenience, of practical expediency, and not in rules of logic. When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out. Thayer, Preliminary Treatise on the Law of Evidence, 266, 516; Wigmore, Evidence, §§ 1421, 1422, 1714.

These precepts of caution are a guide to judgment here. There are times when a state of mind, if relevant, may be proved by

contemporaneous declarations of feeling or intent. *Mutual Life Ins. Co.* v. *Hillmon,* 145 U. S. 285, 295; *Shailer* v. *Bumstead,* 99 Mass. 112; Wigmore, §§ 1725, 1726, 1730. Thus, in proceedings for the probate of a will, where the issue is undue influence, the declarations of a testator are competent to prove his feelings for his relatives, but are incompetent as evidence of his conduct or of theirs. *Throckmorton* v. *Holt,* 180 U. S. 552, 571, 572, 573; *Waterman* v. *Whitney,* 11 N. Y. 157; *Matter of Kennedy,* 167 N. Y. 163, 172. In suits for the alienation of affections, letters passing between the spouses are admissible in aid of a like purpose, Wigmore, § 1730; *Ash* v. *Prunier,* 105 F. 722; *Mutual Life Ins. Co.* v. *Hillmon, supra,* p. 297; *Jameson* v. *Tully,* 178 Cal. 380; *Cottle* v. *Johnson,* 179 N. C. 426; *Curtis* v. *Miller,* 269 Pa. 509, 512. In damage suits for personal injuries, declarations by the patient to bystanders or physicians are evidence of sufferings or symptoms (Wigmore, §§ 1718, 1719), but are not received to prove the acts, the external circumstances, through which the injuries came about. Wigmore, § 1722; *Amys* v. *Barton,* [1912] 1 K. B. 40; *C. & A. R. R. Co.* v. *Industrial Board,* 274 Ill. 336; *Peoria Cordage Co.* v. *Industrial Board,* 284 Ill. 90; *Larrabee's Case,* 120 Me. 242; *Maine* v. *Maryland Casualty Co.,* 172 Wis. 350. Even statements of past sufferings or symptoms are generally excluded, (Wigmore, § 1722 [b]; *Cashin* v. *N. H. H. & H. R. R. Co.,* 185 Mass. 543), though an exception is at times allowed when they are made to a physician. *Roosa* v. *Loan Co.,* 132 Mass. 439, 440; *C. C. C. & I. R. Co.* v. *Newell,* 104 Ind. 264, 271; *contra, Davidson* v. *Cornell,* 132 N. Y. 228, 237. So also in suits upon insurance policies, declarations by an insured that he intends to go upon a journey with another, may be evidence of a state of mind lending probability to the conclusion that the purpose was fulfilled. *Mutual Life Ins. Co.* v. *Hillmon, supra.* The ruling in that case marks the high water line beyond which courts have been unwilling to go. It has developed a substantial body of criticism and commentary.* Declarations of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backwards to the past. There would be an end, or nearly that, to the rule against hearsay if the distinction were ignored.

*Maguire, The Hillmon Case, 38 Harvard Law Review, 709, 721, 727; Seligman, An Exception to the Hearsay Rule, 26 Harvard Law Review, 146; Chafee, Review of Wigmore's Treatise, 37 Harvard Law Review, 513, 519.

The testimony now questioned faced backward and not forward. This at least it did in its most obvious implications. What is even more important, it spoke to a past act, and more than that, to an act by some one not the speaker. Other tendency, if it had any, was a filament too fine to be disentangled by a jury.

The judgment should be reversed and the cause remanded to the District Court for further proceedings in accordance with this opinion.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.